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No. 09-1055

In The Supreme Court of the United States

LUIS RIVERA NEWTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner is entitled to a Certificate of Appealability where it is at least debatable that his Sixth Amendment right to counsel was violated as a result of defense counsels' conflicts of interests based on evidence that a cooperating co-conspirator paid their legal fees in separate but related cases from the proceeds of a drug transaction for which Petitioner was being prosecuted.

II. Whether Petitioner is entitled to a Certificate of Appealability where it is at least debatable that his Fifth Amendment due process rights were violated as a result of the government's failure to disclose, and concealment of, exculpatory evidence, including favorable treatment and criminal history regarding critical government witnesses.

III. Whether Petitioner is entitled to a Certificate of Appealability where it is at least debatable that his trial counsel rendered ineffective assistance of counsel under the Sixth Amendment by failing to allege and prove a double jeopardy violation based on the improper federal prosecution of murder allegations involved in the drug conspiracy charge following Petitioner's local Puerto Rico prosecution (and acquittals) for the same murders.

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OPINIONS BELOW

The unpublished judgment of the United States Court of Appeals, First Circuit, denying Petitioner Rivera Newton's Application for Certificate of Appealability is contained in the Appendix (hereinafter "App.") at pages 1-4. The Order of the United States District for the District of Puerto Rico denying Newton's Application for a Certificate of Appealability is at pages App. 5-6. The district court's underlying Judgment, dismissing Newton's Motion to Vacate, Set Aside, or Correct Judgment is at page App. 17. This Judgment incorporated the district court's Opinion and Order filed the same day, App. 7-16, which adopted, with minor modifications, the Magistrate Judge's Report and Recommendation. App. 18-68.

JURISDICTION

The judgment to be reviewed was entered on December 2, 2009. App. 1-3. Jurisdiction is conferred on this Court by Title 28, U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Due Process Clause of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Counsel Clause of the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense.

Title 28, United States Code section 2253:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> * * *
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> * * *
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> * * *

STATEMENT OF THE CASE

A. Procedural History

Mr. Rivera Newton was convicted of conspiracy to possess with intent to distribute cocaine, heroin, and marijuana following a 2001 trial in the United States District Court for the District of Puerto Rico. App. 18-20. The charges concerned a drug distribution network controlled by one "Negri" operating out of Puerto Rico housing projects from approximately 1989 through 1998. App. 19. Newton was portrayed as Negri's "right-hand man." *Id.* The trial evidence featured two multiple murders of persons involved with the conspiracy. Newton was represented at trial by attorneys Edgar Vega Pabon and Jose Andreu Fuentes. App. 19-20. Following his conviction, Newton was sentenced to life in prison. App. 20.

Newton's conviction and sentence were affirmed by the First Circuit Court of Appeals. *United States v. Newton*, 326 F.3d 253 (1st Cir. 2003). The court rejected *inter alia*, Newton's claim that the district court erroneously excluded evidence that he was acquitted in Puerto Rico court on murder charges stemming from the "Cayey Massacre," the second of the multiple murders. *Id.* at 260-2. It also rejected his claim that he did not knowingly and intelligently waive his right to conflict-free counsel, where one of his attorneys who represented him on the local murder charges, and the other who represented another defendant in a related drug case, were accused of being paid by Negri's organization with

drug proceeds, due to the district court's inadequate colloquy with him. *Id.* at 262-4.

Subsequently, Mr. Newton filed his Motion to Vacate, Set Aside, or Correct the Verdict and Sentence under 28 U.S.C. Section 2255. App. 7. Newton raised five constitutional challenges including a violation of his due process rights under *Brady v. Maryland,* 373 U.S. 83 (1963), App. 20-25, 49-53, and violations of his Sixth Amendment right to counsel based on his attorneys' multiple conflicts of interest, App. 25-36, 53-58, and failure to raise a double jeopardy claim under *Bartkus v. Illinois,* 359 U.S. 121 (1959), due to substantial overlap between, and mutual participation of the prosecuting authorities in, Newton's local murder prosecution and the federal narcotics prosecution. App. 36-42, 58-60. In a 49-page Report and Recommendation, without first conducting an evidentiary hearing, Puerto Rico Chief Magistrate Judge Arenas urged that each of Newton's claims be summarily denied. App. 18-68. After considering Newton's Objections to Magistrate's Report and Recommendation, Puerto Rico District Judge Juan M. Perez-Gimenez issued an Opinion and Order adopting, with minor modifications, the Report and Recommendation. App. 7-16. The judge simultaneously entered Judgment and dismissed Newton's petition with prejudice. App. 17.

Newton timely filed a notice of appeal. The district court denied his Application for a Certificate of Appealability. App. 5-6. The First Circuit Court of

Appeals also denied Newton's separately filed Application for Certificate of Appealability. App. 1-4.

B. Facts

As summarized by the First Circuit on direct appeal and accepted by the district court on habeas review:

> The evidence at trial described Rivera Newton's involvement in a "hub-and-spoke conspiracy" to distribute multi-kilogram quantities of cocaine, heroin and marijuana from the early months of 1989 to April 8, 1998. The drugs were sold at specialized distribution points for each substance ("drug points") primarily located within the Gautier Benitez Housing Project ("Gautier Benitez") in Cagua, Puerto Rico. While the drug points were managed by different individuals, every distribution point in Gautier Benitez was ultimately controlled by Edsel Torres Gomez (a.k.a. "Negri"), the de facto hub of the conspiracy. At trial, the government portrayed Rivera Newton as Negri's right-hand man and presented witnesses who testified to Rivera Newton's role as a conduit between Negri and lower-level members of the conspiracy. Negri also entrusted Rivera Newton with various high-level responsibilities such as counting the money received in drug transactions and testing the quality of the drugs purchased from other dealers.

App. 19 (quoting *Newton*, 326 F.3d at 255 (footnote omitted)).

Testimony about two, multiple murders played prominently at Newton's trial:

> The first murders, referred to at trial as the "Isla Verde murders," eliminated Davey and another drug dealer in retaliation for their unauthorized encroachment on Negri's drug points. Perez Alicea testified that he was supplying drugs in October 1994 to an individual named Wes Solano, who, according to appellant, was "the head of one of Puerto Rico's most extensive and violent drug organizations." Solano frequented an apartment that Perez Alicea rented in the Isla Verde area. At one point he arranged for Negri, Jimmy Peligro, and Cano Newton (Rivera Newton's brother) to conduct surveillance from the apartment to determine whether Davey and the second drug dealer were infringing on Negri's drug points. After confirming his suspicions, Solano and an accomplice killed the two drug dealers the next day. Later, Solano justified the killings to Perez Alicea as the elimination of two individuals who "were trying to outsmart Negri with regard to . . . certain drug points."
>
> The second multiple murder, dubbed the "Cayey Massacre" by the Puerto Rico press, was the brutal torture and murder of four individuals who supposedly stole $4.2 million in drug proceeds that Negri had temporarily stored at Fernandez Rios's residence.

> Fernandez Rios testified that avenging this theft was particularly important for Negri not only to recover the money itself, but also because "the loss of that money had to be justified in the eyes of the Colombians" who supplied drugs to Negri and were presumably concerned with the security of his operation.
>
> On March 13, 1994, Negri informed Perez Alicea that he had kidnaped the four individuals who committed the robbery. One of the individuals was shot and killed immediately, and Rivera Newton helped direct the interrogation of the other three. Negri's associates tortured the three individuals by tearing out their fingernails, burning them with acid, and forcing them to drink gasoline. They then threw the accused thieves in the back seat of a car, where they were shot and set on fire. Rivera Newton's participation in the Cayey Massacre was a central issue at trial, and ultimately an aggravating factor that led the district court to sentence him to life imprisonment, the maximum sentence permitted by the Guidelines.

Newton, 326 F.3d at 256-7.

Primary evidence against Newton was the testimony of seven co-defendants who received sentence reductions in exchange for their testimony. *Newton* at 255. Co-defendant Fernandez Rios, the main supplier to the Negri organization, "was central to the prosecution's case" and "critical to the court's sentencing determination." App. 22, 29. He testified about large

quantities of cocaine and marijuana he sold to Negri which were delivered to distribution points managed by Newton. He also testified about the theft of $4.2 million in drug proceeds from his apartment that precipitated the four Cayey Massacre murders. App. 22. Fernandez Rios was impeached with a couple of decades-old convictions. App. 23. He admitted hope of a sentence reduction in a recent federal case in which he had already been sentenced but claimed no agreement or expectation of sentence reduction in the instant case. App. 22.

William Del Valle testified as if "a casual impartial eye-witness observer of the events at Gautier Benitez." App. 25. He testified regarding the Cayey Massacre that he observed Newton with a .38 caliber handgun "and a red gas can which he was 'spreading' on the torture victims." *Id.* He was impeached by a couple of weapons-related convictions and an attempted auto theft conviction. App. 23-24. Although these arrests violated the terms of the witness protection program he was in, he was not terminated and was not convicted of one or more offenses because of his status as a witness in this case. App. 24. Del Valle's testimony presented significant, if not sole, support for the government's rebuttal argument that Newton was guilty of murdering the three Cayey torture victims. *Id.* It was cited by the court in support of Newton's life sentence it imposed under the enhanced murder guideline. *Id.*

Immediately before trial, the government revealed that Fernandez Rios had obtained 40

kilograms of cocaine from a Colombian drug source to sell for use in paying legal fees for the Cayey Massacre defendants. *Newton*, 326 F.3d at 263. Fernandez Rios gave the proceeds from this sale to an attorney closely associated with Negri. *Id.* Newton and his brother Miguel were two of the Cayey Massacre defendants and were represented in that case by Andreu Fuentes (and a co-counsel). *Id.* The government had no evidence that Fuentes had been paid from this fund to represent Newton. *Id.* The government further revealed that Fernandez Rios had paid attorney fees in a federal reverse sting prosecution of Ismael Vega Leon, who was represented by Vega Pabon. App. 21, 26. Although Fernandez Rios believed Vega Pabon had been paid from this fund to defend Vega Leon, the government had no such evidence. *Newton* at 263.

In response to these revelations, Vega Pabon proffered that Fernandez Rios told him (in an interview shortly before trial) that half of the cocaine from the Colombian source went to Vega Leon and the remainder was bound for Negri who was contacted through Newton and his brother Miguel. App. 34-35. Fernandez Rios did not identify the attorneys who received drug proceeds to defend the local murder prosecutions. *Id.* Further, though when Vega Pabon told Fernandez Rios that he was the attorney for Vega Leon, Fernandez Rios maintained he had paid Vega Pabon's legal fees, Vega Pabon responded that he was wrong because he was paid with certified checks from Vega Leon's wife. *Id.* Vega

Pabon further asserted that he never represented Newton in the local murder prosecution. *Id.*

Based on this, the district court addressed Newton regarding the possible conflict of interest if Vega Pabon had been paid with drug proceeds. App. 35-36. The district court elicited that Newton was aware of the potential conflict and that his attorneys had explained the relevant circumstances to him. The court advised Newton that he could retain other attorneys and that the court would postpone the trial for this purpose. *Id.* After the court repeated what the government had proffered, Newton advised the court that he wished to maintain both Vega Pabon and Fuentes as his attorneys. *Id.*; *Newton*, 326 F.3d at 363.

In his 2255 motion, Newton proffered that Fernandez Rios was "Frank el Viejo from 172," who was negotiating to purchase the 50 kilos of cocaine from federal agents in the Vega Leon reverse sting. App. 21, 27. Vega Leon would testify that the money in his possession at the time of his arrest was intended for use by Fernandez Rios to buy the cocaine. App. 21. Fernandez Rios was never charged or prosecuted for this offense. He paid Vega Leon's legal fees because while he escaped prosecution, Vega Leon was convicted and sentenced to prison. *Id.* The government failed to reveal this significant "bad act" and additional benefit Fernandez Rios either received, or expected to receive, from the government. App. 21-22. Newton further proffered an additional

state court conviction of Fernandez Rios that had not been disclosed by the government. App. 23.

Newton also proffered that, as a result of Fernandez Rios' payment of attorney fees for the defense of Vega Leon, including to Vega Pabon, several conflicts of interest arose. App. 26. Vega Pabon had a personal interest in protecting his own reputation and avoiding further disclosure of facts through cross-examination of Fernandez Rios that would implicate him in receiving drug proceeds to pay for the defense of Vega Leon. App. 26, 41-2. Indeed, Vega Pabon moved in limine to prevent any such testimony. App. 28. Such cross-examination of Fernandez Rios revealing this additional, uncharged criminal activity would have been useful to more effectively impeach Fernandez Rios. Additionally, Vega Pabon was precluded by his obligation to Vega Leon from using any information obtained from Vega Leon regarding Fernandez Rios' involvement in the criminal activity underlying his prosecution to further discredit Fernandez Rios at Newton's trial. App. 28.

Andreu Fuentes, one of the attorneys for Newton and his brother in the local murder prosecution, suffered from the same conflict of interest in his desire to not prompt Fernandez Rios to disclose more information implicating him in the receipt of drug proceeds to defend Newton and his brother in the murder case. App. 30, 41-2. This conflict was particularly acute because of the trial testimony that Fernandez Rios delivered drug proceeds to Newton to

pay counsel's fees and the government's argument that Newton's association with the Negri attorney who received money for the Cayey Massacre defense was evidence of Newton's participation in the conspiracy. *Id.* Additionally, Fuentes failed to utilize information gained through his defense of the Cayey Massacre prosecution in Newton's federal defense. This included documentation demonstrating that Newton's brother Miguel, with whom witnesses placed Newton at the scene of the Cayey Massacre victims' interrogation, was in Florida at the time, and a theory of defense that Miguel, not Newton, was the real player in the Gautier Benitez drug distribution enterprise and that Newton was a mere "tagalong." App. 31.

Newton's attorneys also failed to conduct critical cross-examination of Del Valle. The government failed to disclose at least one of Del Valle's two other serious convictions including an armed car-jacking and another car theft arrest. App. 24. The attorneys failed to inquire about his significant drug abuse, the effect it may have had on his identification of Newton, and any inability to recognize other members of the drug organization. App. 31-2. They failed to cross-examine on his direct involvement in the Gautier Benitez drug trade as revealed in his grand jury testimony. *Id.* Also unaddressed were the facts that Del Valle did not begin to cooperate until after his wife was placed in witness protection and after a friend was hung in jail by people associated with

Negri, a score he may have sought to settle by testifying against Newton. App. 32.

Lastly, Newton proffered that his attorneys failed to raise a double jeopardy defense to his federal prosecution based on the substantial overlap between, and mutual participation of the prosecution authorities in, Newton's local murder prosecution and the federal narcotics prosecution. As the magistrate judge described:

> . . . Fuentes knew [Newton] had been tried and acquitted of the murders, and that the prosecution had been using the local trial as a dress-rehearsal for the federal trial. It was evident that the fiction of two separate, independent sovereignties was being manipulated to test theories, witnesses and evidence in local court. Local trial counsel also had access to all the information about the federal involvement in the nominally "local" prosecutions, including the participation of federal prosecutors and agents of the FBI, DEA, and Customs from its inception. . . . [This] was, in fact, not two separate prosecutions for different offenses by independent sovereigns, but a single seven-year concerted effort, directed by the United States, to punish [Newton] for the Cayey murders. . . .

App. 37.

C. Rulings

The district court, by adopting the Report and Recommendation, rejected Newton's *Brady* claim concluding it was "pure speculation" that Fernandez Rios was "Frank El Viejo of 172," who was neither arrested nor prosecuted in the Vega Leon case. App. 51. Notwithstanding the similarity of the names and the proffered testimony of Vega Leon that he was arrested with money intended for use by Fernandez Rios to purchase the cocaine, App. 21, the court relied upon the government's failure to investigate this aspect of the case and Fernandez Rio's denial to support its conclusion. App. 51-2. Regarding the conflict of interests, despite Newton's extensive proffer of conflicts and adverse effects, App. 26-32, the court concluded any conflict was "potential and not actual," App. 57, and there was no adverse effect on representation. App. 58. It pointed to Vega Pabon's "emphatic[ ] deni[al] . . . [of] having received drug money. . . ." *Id.* The court also claimed affirmation by the First Circuit, App. 56, despite that court's narrow focus on the adequacy of the conflict waiver colloquy. *Newton*, 326 F.3d at 263-4. Lastly, notwithstanding Newton's detailed proffer of extensive overlap and mutual participation of the prosecutorial authorities between Newton's local murder prosecution (which resulted in an acquittal) and the federal drug case, App. 36-41, and the fact he was provided no evidentiary hearing, the court concluded, in effect, there could be no ineffective counsel because there was no

identity between the local and federal cases and, hence, no viable double jeopardy claim. App. 58-60.

The district court, in its Order denying Newton's application for a certificate of appealability, recited the "debatable among jurists of reason" standard. App. 6. But elaborating, it stated it denied the application because "it contain[ed] exactly the same arguments that were raised in [Newton's] Motion to Vacate Sentence . . . " which the court had already found "to be without merit." *Id.*

In its Judgment denying Newton's application, the First Circuit acknowledged that it must "take as true the sworn allegations of facts set forth in the petition 'unless those allegations are merely conclusory, contradicted by the record, or inherently incredible.'" App. 1. It found Newton's *Brady* claim "contradicted by the record and/or . . . immaterial because merely cumulative." App. 2. The court held that "reasonable jurists could not find that Newton's [conflict of interests] allegations would satisfy the requirement to show adverse action or inaction by counsel as a result of the conflict." App. 3. Finally, it found that "reasonable jurists could not find that this case falls within the 'sham prosecution' exception under *Bartkus v. Illinois,* 359 U.S. 121 (1959)." *Id.*

REASONS FOR GRANTING THE WRIT

I. The Judgment of the First Circuit Court of Appeals, Denying a Certificate of Appealability Regarding Petitioner's Claims That He Was Denied His Fifth Amendment Right to Due Process By the Government's Failure to Disclose Material Impeachment Regarding Critical Government Witness, and Denied His Sixth Amendment Rights to Conflict-Free and Effective Counsel, Conflict With Decisions of This Court and Other Courts of Appeals on These Critical Matters Requiring the Reconciliation by This Court.

A. Conflicts of Interest Claim

Newton's most vital weapon against the government's onslaught, an effective attorney single-mindedly dedicated to defending against the charges, was crippled by actual and overwhelming conflicts of interest. Attorney Vega Pabon was implicated in receiving drug money to pay attorney fees. A more probing cross-examination of Fernandez Rios risked provoking more detailed accusation and damage to his reputation. He was further prevented from utilizing information learned through representation of Vega Leon, a client with whom Fernandez Rios had substantial criminal dealings, to cross-examine Fernandez Rios and better expose his self-interest in testifying against Newton.

Newton's other counsel, Andreu Fuentes, labored under a similar conflict based on the government's

revelation that Fernandez Rios sold drugs to pay legal fees for the Cayey Massacre defendants. Fuentes represented Newton and his brother Miguel in these prosecutions. Fuentes failed to use critical information garnered through his involvement in that case, including documentary evidence undermining the government's damning allegation of Newton's involvement in the Cayey Massacre, to defend Newton against the federal charges. Despite these extensive proffers, Newton was denied an evidentiary hearing. These actual, debilitating conflicts, which adversely affected these attorneys' representation of Newton, required vacation of Newton's conviction and sentence.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense." It protects a defendant's right to *effective* assistance of counsel. *See Strickland v. Washington,* 466 U.S. 668 (1984); *United States v. Sanchez-Barreto,* 93 F.3d 17, 20 (1st Cir. 1996), *cert. denied sub nom., Arroyo-Reyes v. United States,* 519 U.S. 1068 (1997). This right is paramount because it is "necessary to ensure fundamental human rights of life and liberty." *Johnson v. Zerbst,* 304 U.S. 458, 462 (1932). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." *Penson v. Ohio,* 488 U.S. 75, 84 (1988) (citation omitted). This right is accorded "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens v. Taylor*, 535

U.S. 162, 166 (2004) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

Effective representation contemplates an attorney "whose undivided loyalties lie with his client." *United States v. Shorter*, 54 F.3d 1248, 1252 (7th Cir.), *cert. denied*, 516 U.S. 896 (1995); *see also Wood v. Georgia*, 450 U.S. 261, 271 (1981) (right to counsel contemplates "representation that is free from conflicts of interest"). "Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest." *United States v. Henke*, 222 F.3d 633, 638 (9th Cir. 2000) (per curiam). Accordingly, when an attorney labors under an actual conflict of interest that adversely affects representation, the Sixth Amendment counsel guarantee is violated. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980). A defendant's interest in conflict-free representation is so strong that courts, under certain circumstances, must disqualify counsel, even in the face of a knowing and intelligent waiver of the right to conflict-free counsel. *See Wheat v. United States*, 486 U.S. 153, 162-3 (1988); *United States v. Ross*, 33 F.3d 1507, 1522-4 (11th Cir. 1994).

To prove a generic claim of ineffective assistance of counsel, the claimant must demonstrate prejudice resulting from the ineffectiveness. *E.g.*, *Strickland*, 466 U.S. at 687, 694. But this Court's cases establish that where a claimant demonstrates an actual conflict of interest that adversely affects representation, prejudice may be presumed and need not always be shown. *E.g.*, *Cuyler* at 349-50; *Glasser v. United*

States, 315 U.S. 60, 75 (1942). Some cases have held that the exception to showing prejudice only applies in cases involving representation of multiple or serial defendants. *See, e.g., Coban v. United States,* 281 F.3d 778, 781-2 (8th Cir. 2002); *Beets v. Collins,* 65 F.3d 1258, 1265-72 (5th Cir. 1995) (*en banc*), *cert denied,* 517 U.S. 1157 (1996). But this Court has continued to reiterate the exception more generally as applying to *any* case in which an attorney is burdened by an actual conflict of interest that adversely affects the attorney's representation. *See Smith v. Robbins*, 528 U.S. 259, 287 (2000); *Strickland,* 466 U.S. at 692. *See also Mickens*, 535 U.S. at 172 n.5 (discussing relationship between "actual conflict" and "adverse effect" requirements: "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance").

As the court explained in *United States v. Levy,* 25 F.3d 146 (2nd Cir. 1994): "An attorney has an actual, as opposed to a potential, conflict of interest when during the course of the representation, the attorney's and the defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" *Id.* at 155 (citation omitted). "Upon a showing of such a conflict, a defendant need not demonstrate prejudice because a conflict inhibiting a lawyer's performance is such an affront to the right to effective assistance of counsel that . . . [it] demonstrates a denial of that right." *United States v. Soldevila-Lopez,* 17 F.3d 480, 486 (1st Cir. 1994) (citing, *inter alia, United States v. Hunt,* 543 F.2d 162, 165-8 (D.C. Cir. 1976)).

Actual conflicts of interests resulting in *per se* prejudice frequently arise in the context of attorneys representing multiple defendants. *See Cuyler.* However, actual conflicts of interest also may arise when an attorney's personal interests diverge from those of his client. *Sanchez-Barreto,* 93 F.3d at 20; *Soldevila-Lopez,* 17 F.3d at 487 n.4; *United States v. Fulton,* 5 F.3d 605, 609-11 (2nd Cir. 1993); *United States v. McLain,* 823 F.2d 1457, 1463-64 (11th Cir. 1987); *United States v. Ellison,* 798 F.2d 1102, 1106-09 (7th Cir. 1986), *cert. denied,* 479 U.S. 1038 (1987). Such a conflict may also arise when a lawyer representing a criminal defendant becomes a witness to a material fact in the case. *See, e.g., United States v. Kliti,* 156 F.3d 150, 155-57 (2nd Cir. 1998); *United States v. Locascio,* 6 F.3d 924, 933-32 (2nd Cir. 1993), *cert. denied,* 511 U.S. 1070 (1994).

In the instant case, the conflicts of interests that Newton demonstrated afflicted his attorneys were "actual" and "adversely affected" their representation of him. Thus, he established a denial of his constitutional right to counsel. Both Vega Pabon and Andreu Fuentes were implicated in criminal and unethical misconduct by Fernandez Rios. Their interest in protecting themselves from further recrimination that would inevitably result from vigorous cross-examination of Fernandez Rios directly conflicted with their ethical duty to zealously represent Newton and aggressively discredit his accusers. Vega Pabon was further cobbled by his previous representation of Vega Leon through which he must have fully known,

having now identified Fernandez Rios as "Frank El Vejio of 172," the true extent of Fernandez Rios' involvement with narcotics trafficking and the benefits he was receiving from the government for his testimony. Fuentes was directly implicated by trial evidence that drug money was used to pay attorney fees for the Cayey Massacre defendants (two of whom, Newton and his brother, he represented). Vega Pabon and Fuentes failed to aggressively impeach Fernandez Rios and bring forth exculpatory evidence and theories that would have focused a sharper spotlight on the accusations against them. Given the pervasiveness of these debilitating conflicts, any waiver the district court secured from Newton at trial was ineffectual to protect his Sixth Amendment right.

In *United States v. Fulton,* 5 F.3d 605 (2nd Cir. 1993), on facts highly analogous to those of the instant case, the court held that an actual conflict of interest exists that deprives a defendant of Sixth Amendment counsel and requires reversal where the attorney is implicated in criminal misconduct related to the charges for which his client is on trial. The defendant was accused of conspiracy to possess and import heroin. *Id.* at 606. In the midst of one of its witnesses' testimony, the government disclosed that the witness claimed he had once imported heroin for defense counsel. *Id.* at 606-7. The government explained that its investigation of the allegation had just begun and it did not know if it was true. The district court carefully explained the nature of the afflicting conflicts to the defendant: defense counsel's

personal interest in avoiding/minimizing reputational damage and criminal accusations, and counsel being a potential witness in favor of the defendant by denying the accusation. *Id.* at 608. After being afforded an opportunity to consult and decide, the defendant waived any conflict. *Id.* Following the defendant's conviction and sentencing, the district court denied his 2255 petition alleging deprivation of his Sixth Amendment right to counsel. *Id.*

Reversing, the court noted that when an attorney is accused of criminal or ethical misconduct related to his client's case, "the same core problem" arises as where an attorney represents more than one defendant in a case or is paid legal fees by a co-defendant – "the defendant's interests . . . diverge with respect to a material factual or legal issue or to a course of action." *Id.* at 609. In describing the nature of the conflicts and the impact upon the right to counsel, the court spoke directly to the untenable position Newton was placed in by the conflicts his attorneys had:

> When a government witness alleges that the defendant's counsel engaged in criminal conduct related to the charges for which the defendant is on trial, it creates one of two actual conflicts. First, if the allegations are true, concerns we expressed in [*United States v.*] *Cancilla*[, 725 F.2d 867 (2nd Cir. 1984)] arise: the attorney may fear that a spirited defense could uncover convincing evidence of the attorney's guilt or provoke the government into action against the attorney. Moreover, the attorney is not in a position to give

> unbiased advice to the client about such matters as whether or not to testify or to plead guilty and cooperate since such testimony or cooperation from the defendant may unearth evidence against the attorney.
>
> Second, even if the attorney is demonstrably innocent and the government witness's allegations are plainly false, the defense is impaired because vital cross-examination becomes unavailable to the defendant. Ordinarily, a witness's blatantly false allegations provide a rich source for cross-examination designed to cast doubt on the witness's credibility; but, when the allegations are against the defendant's attorney, this source cannot be tapped. An attorney cannot act both as advocate for his client and a witness on his client's behalf . . . And in questioning a witness concerning his allegations against the attorney, the attorney effectively becomes an unsworn witness.

Id. at 610 (citations omitted).

Explaining application of its "*per se* rule" for establishing a Sixth Amendment violation, the court noted that this rule does not apply anytime a court learns that an attorney may have committed a crime: "The *per se* rule applies [only] when an attorney is implicated in the crimes of his or her client since, in that event, the attorney cannot be free from fear that a 'vigorous defense should lead the prosecutor or the trial judge to discover' evidence of the attorney's 'own wrongdoing.'" *Id.* at 611 (citations omitted). Citing *Wheat v. United States,* 486 U.S. 153 (1988), the court

also found that the federal courts' "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that the legal proceedings appear fair to all who observe them" required invalidation of the waiver. *Id.* at 612-13.

> Where a government witness implicates defense counsel in a related crime, the resultant conflict so permeates the defense that no meaningful waiver can be obtained. In such case, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant.

Id. at 613.

In reaching its decision, the *Fulton* court relied heavily upon *Mannhalt v. Reed,* 847 F.2d 576 (9th Cir. 1988), and *United States v. Cancilla,* 725 F.2d 867 (2nd Cir. 1984), cases in which the courts also reversed the defendants' convictions based on a denial of the right to counsel where the defendants' attorneys were implicated in criminal activity related to the allegations against the defendants they were representing.

The First Circuit's judgment in the instant case, refusing to issue a certificate of appealability, directly conflicts with *Fulton* and the cases upon which it relied, as well as numerous decisions of other circuit courts of appeals finding actual conflicts of interest

adversely affecting representation where counsel are hampered by personal conflicts and self-interest, as well as obligations to prior clients, as were Vega Pabon and Andreu Fuentes. *See, e.g., Lopez v. Scully*, 58 F.3d 38 (2nd Cir. 1995) (actual conflict of interest adversely affecting representation where defendant accused counsel of incompetence); *United States v. Shorter,* 54 F.3d 1248, 1252-3 (7th Cir.) (attorney accused of forcing client to plead guilty and who asserted client made false statements to the court had actual conflict of interests and where counsel failed to make mitigating argument at sentencing, prejudice was presumed), *cert. denied,* 516 U.S. 896 (1995); *Ross*, 33 F.3d at 1523-4 (actual and potential conflicts of interest required disqualification of defense counsel based, in part, on counsel's prior representation of potential witness in a related case); *United States v. Levy,* 25 F.3d 146 (2nd Cir. 1994) (record demonstrated counsel labored under actual conflict of interest due to self-interest that adversely affected representation and required vacation of conviction and sentence); *United States v. McLain,* 823 F.2d 1457, 1463-64 (11th Cir. 1987). These cases establish the important constitutional principle that when an attorney's self-interest in avoiding or minimizing accusation of ethical or criminal misconduct, or duty of loyalty to a former client, conflicts with the attorney's duty of loyalty to a defendant such that it adversely affects that representation, a denial of the right to counsel is established and the defendant's conviction and/or sentence must be vacated. To reconcile the First Circuit's decision which disclaimed, on

these facts, that this issue was even debatable, this Court should review that decision and issue a certificate of appealability.

B. *Brady* Claim

Newton, if convicted, faced a life sentence. The government's case rested predominantly on co-defendants testifying in hope of sentence reductions. It was vital for him to discredit these witnesses and fully expose their motivation to lie against him. The government failed to disclose significant criminal background of two of these pivotal witnesses, Fernandez Rios and Del Valle. It also failed to disclose the direct involvement of the most important witness, Fernandez Rios, in a web of additional criminal activity, the Vega Leon reverse sting and laundering drug proceeds through attorneys, that directly related to the charges against Newton and implicated Newton's defense attorneys. Despite extensive proffers, Newton was denied an evidentiary hearing. Without this information, Newton was denied a fair opportunity to defend.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that due process requires the government to disclose *all* evidence favorable to an accused when such evidence is material to guilt or punishment. *Id.* at 87. In *United States v. Bagley*, 473 U.S. 667 (1985), this Court explained that evidence is material if there is a reasonable probability that disclosure of it would have changed the outcome of the proceeding. *Id.* at 682.

This standard is not met by "[t]he mere possibility that . . . undisclosed information *might* have helped the defense. . . ." *United States v. Agurs,* 427 U.S. 97, 109 (1976) (emphasis added). But, nor does the standard require a showing that disclosure of the suppressed evidence *more likely than not* would have resulted in acquittal. *Kyles v. Whitney*, 514 U.S. 419, 434-5 (1995). The question is whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Thus, a defendant need only show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id. See also Banks v. Dretke,* 540 U.S. 668, 698 (2004); *Strickler v. Green*, 527 U.S. 263, 290 (1999). This determination must take account of the cumulative effect of the suppressed evidence in light of other evidence, not merely the probative value of the suppressed evidence standing alone. *Kyles* at 437.

The favorable evidence that the government withheld from Newton satisfied the parameters of this Court's *Brady* doctrine. It included significant additional convictions of Fernando Rios and Del Valle, two of the government's main witnesses. More importantly, it consisted of Fernandez Rios' direct involvement in narcotics trafficking and money laundering, directly related to the charges against Newton, that the government obviously was overlooking in exchange for his testimony against Newton. Cumulatively, this information discrediting crucial components of the government's case against Newton,

placed this case "in such a different light as to undermine confidence in the verdict." Absent disclosure, Newton was denied due process and a fair trial.

The decision of the First Circuit, refusing even to issue a certificate of appealability, conflicts with several cases from other circuit courts of appeals finding *Brady* violations requiring new trials. In *Monroe v. Angelone,* 323 F.3d 286 (4th Cir. 2003), the court found a *Brady* violation where the government failed to reveal leniency agreements with key witnesses. *Id.* at 314. In *United States v. Boyd,* 55 F.3d 239 (7th Cir. 1995), the court found a *Brady* violation where the government failed to disclose favors done for witnesses. In *United States v. Pelullo,* 105 F.3d 117 (3rd Cir. 1997), the court found a *Brady* violation requiring a new trial because the cumulative effect of the non-disclosed impeachment evidence resulted in a verdict unworthy of confidence. *Id.* at 122-4. In *Smith v. Secretary Department of Corrections*, 50 F.3d 801 (10th Cir.), *cert. denied sub nom., Mondragon v. Smith,* 516 U.S. 905 (1995), the court found a *Brady* violation because disclosure of the suppressed evidence taken *cumulatively* might have led to a different result, even if some evidence was insignificant standing alone. *Id.* at 834. Although these decisions all turned on facts unique to each case, the First Circuit's application of this Court's *Brady* jurisprudence in the instant case clashes with them so as to require review and harmonization by this Court.

C. Ineffective Assistance of Counsel – Failure to Raise Double Jeopardy Claim

This Court has held that prosecutions undertaken by separate sovereign governments do not raise the specter of double jeopardy, as double jeopardy is commonly understood. *See Heath v. Alabama,* 474 U.S. 82, 88 (1985). Nonetheless, this Court has recognized that under limited circumstances, such as where a preceding state prosecution is "a tool of the federal authorities" or "a sham and a cover for a federal prosecution," successive prosecutions by separate sovereigns may violate the Fifth Amendment Double Jeopardy Clause. *Bartkus v. Illinois,* 359 U.S. 121, 123-4 (1959).

The First Circuit has adopted the *Bartkus* exception, making clear that it applies to situations in which "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *United States v. Guzman,* 85 F.3d 823, 827 (1st Cir.), *cert. denied,* 519 U.S. 1020 (1996). Several other circuit courts of appeals also have embraced this facet of double jeopardy protection. *See, e.g., United States v. Davis,* 906 F.2d 829, 834-5 (2nd Cir. 1990) (to prevail under *Bartkus*, defendant must establish that federal government was the "laboring oar" in the state proceedings and federal prosecutors actively aided state prosecutors); *In re Kunstler,* 914 F.2d 505, 517 (4th Cir. 1990) (to establish sham prosecution, defendant must show "[s]tate officials had little or no independent volition

in their proceedings"), *cert. denied sub nom., Kunstler v. Britt,* 499 U.S. 969 (1991); *United States v. Solis,* 299 F.3d 420, 435 (5th Cir. 2002) (defendant must establish prima facie case of "collusion between federal and state law enforcement officials" in successive prosecutions); *United States v. Heidecke,* 900 F.2d 1155, 1160 (7th Cir. 1990) (a defendant must make a "colorable showing" that federal prosecution is not proper and a mere sham).

The district court captured the essence of Newton's allegations in his 2255 motion as follows:

> . . . Fuentes knew [Newton] had been tried and acquitted of the murders, and that the prosecution had been using the local trial as a dress-rehearsal for the federal trial. It was evident that the fiction of two separate, independent sovereignties was being manipulated to test theories, witnesses and evidence in local court. Local trial counsel also had access to all the information about the federal involvement in the nominally "local" prosecutions, including the participation of federal prosecutors and agents of the FBI, DEA, and Customs from its inception. . . . [This] was, in fact, not too separate prosecutions for different offenses by independent sovereigns, but a single seven-year concerted effort, directed by the United States, to punish [Newton] for the Cayey murders. . . .

App. 37.

Given this proffer (which the court, absent an evidentiary hearing, was required to accept as true), the First Circuit's Judgment denying a COA conflicts with the application of the standards adopted by the other circuit courts of appeals cited above. To reconcile its incongruous interpretation of *Bartkus* with the other circuit courts of appeals, this court should review its Judgment and issue a certificate of appealability.

II. The First Circuit Court of Appeals, By Denying Petitioner a Certificate of Appealability to Secure Review of the District Court's Decision Denying His Substantial Conflict of Interest, *Brady*, and Ineffective Assistance of Counsel Claims, Particularly Where He Was Never Afforded an Evidentiary Hearing, Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Supervisory Power.

As a condition precedent to Newton's right to appeal, he was required to secure a certificate of appealability. Title 28, U.S.C. § 2253(c). To secure a COA, Newton only needed to make a "substantial showing of the denial of a constitutional right."

This Court elucidated the applicable standard in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). A petitioner need only "sho[w] that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner. . . ." *Id.* at 336. Although the

Court stated that a litigant must prove "something more than the absence of frivolity or the existence of mere 'good faith' on his or her part," *id.* at 338, a claim can be debatable, and hence the standard can be met, "even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, the petitioner will not prevail." *Id.* As the First Circuit observed, because the district court denied Newton an evidentiary hearing, the court was required to accept all of his sworn allegations of fact set forth in his petition unless "merely conclusory, contradicted by the record, or inherently incredible." App. 1.

The First Circuit's application of this standard to the instant case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Newton thoroughly pled the three violations of fundamental constitutional rights that he maintains deprived him of a fair determination of guilt or innocence and a just sentence. His allegations were neither conclusory, contradicted by the record, nor inherently incredible.

The First Circuit opined that Newton's "allegations of withheld or suppressed evidence are contradicted by the record and/or are immaterial because merely cumulative." App. 2. But it did not cite a single contradiction or show immateriality. Although the court appears to have accepted the existence of a conflict of interest, it asserted that Newton has only "speculated" about what adverse effect this conflict of interest wrought. App. 3. But Newton identified with

specificity the actions not taken by defense counsel. App. 28-34. Lastly, to defeat Newton's claim that counsel were ineffective for failing to make a double jeopardy claim, the First Circuit effectively determined there was no "prejudice" because any such claim would have failed on the merits. App. 2-3. However, given the denial of an evidentiary hearing, the court was required to accept Newton's allegations of a "sham prosecution" as true.

The imperative of issuing a COA was particularly great given that Newton was denied an evidentiary hearing at which to develop and better substantiate his claims. Representative cases have reversed district court judgments denying 2255 petitions and remanded for evidentiary hearings where, as in the instant case, allegations were detailed and non-conclusory, not contradicted by the record, and not inherently incredible. *See, e.g., Owens v. United States,* 483 F.3d 48, 57 (1st Cir. 2007); *United States v. Jackson,* 209 F.3d 1103, 1110 (9th Cir. 2000); *Arrendondo v. United States,* 178 F.3d 778, 782, 788-9 (6th Cir. 1999). Issuing a COA where a petitioner has been denied an evidentiary hearing helps ensure that what is likely to be the petitioner's final opportunity to establish the unconstitutionality of his conviction or sentence, has not been denied precipitously.

Given Newton's plenary pleadings raising well-recognized constitutional challenges to his conviction and sentence, and the district court's denial of an evidentiary hearing, the First Circuit has set the certificate of appealability bar too high. It has failed

to abide this Court's mandate in *Miller-El* that debatable claims be allowed to proceed "even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, the petitioner will not prevail." Given the severity of Newton's life sentence, any doubt whether to grant a COA should have been resolved in his favor. *See, e.g., Haines v. Quarterman,* 526 F.3d 189, 193 (5th Cir. 2008); *Graves v. Cockrell*, 351 F.3d 143, 150 (5th Cir. 2003), *cert. denied*, 541 U.S. 1057 (2004). For all of these reasons, the First Circuit's judgment calls for the exercise of this Court's supervisory power and issuance of the requested certificate of appealability.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MANDATE

United States Court of Appeals
For the First Circuit

No. 08-2519

LUIS RIVERA-NEWTON,
Petitioner, Appellant,

v.

UNITED STATES,
Respondent, Appellee.

Before
Torruella, Boudin and Lipez,
Circuit Judges.

JUDGMENT

Entered: December 2, 2009

Petitioner Luis Rivera Newton seeks a COA to pursue due process and Sixth Amendment claims that were raised in his motion pursuant to 28 U.S.C. § 2255, seeking to vacate his conviction and life sentence for drug trafficking. We have carefully reviewed the record, And because this § 2255 petition was denied without a hearing, we "take as true the sworn allegations of fact set forth in the petition 'unless those allegations are merely conclusory, contradicted by the record, or inherently incredible.'" *Owens* v. *United States*, 483 F.3d 48, 57 (1st Cir. 2007).

With respect to petitioner's claim that impeachment evidence was withheld or suppressed by the government in violation of his due process rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), we conclude that the allegations of withheld or suppressed evidence are contradicted by the record and/or are immaterial because merely cumulative. *See Conley* v. *United States*, 415 F.3d 183, 189 (1st Cir. 2005). Petitioner's allegations in support of his claim that the prosecution violated his due process rights by introducing testimony that it knew or should have known to be false, are also contradicted by the record.

Even accepting as true petitioner's allegations in support of his claim that his trial counsel was ineffective for failing to move to dismiss the indictment on double jeopardy grounds, reasonable jurists could not find that this case falls within the "sham prosecution" exception under *Bartkus* v. *Illinois*, 359 U.S. 121 (1969). "Cooperative law enforcement efforts between independent sovereigns are commendable and, without more, such efforts will not furnish a legally adequate basis for invoking the *Bartkus* exception to the dual sovereign rule." *United States* v. *Guzman*, 85 F.3d 823, 828 (1st Cir. 1996). A joint investigation of criminal activity does not bring a case within the *Bartkus* exception. *See United States* v. *Aboumousallem*, 726 F.2d 906, 910 (2d Cir. 1984). Nor are "conversations and, cooperative efforts between state and federal investigators" evidence of a "sham prosecution." *United States* v. *Brocksmith*, 991 F.2d 1363, 1366-67 (7th Cir. 1993); *see also United States* v.

Angleton, 314 F.3d 767, 774 (5th Cir. 2002). The fact of dual sovereigns also precludes Newton from prevailing on his collateral estoppel claim. *See United States* v. *Perez-Perez*, 72 F.3d 224, 226 (1st Cir. 1995).[1]

Finally, even if Fernandez Rios' allegations that Newton's defense attorneys may have been compensated in prior state and federal proceedings through a defense fund financed by drug proceeds might constitute a conflict of interest, reasonable jurists could not find that Newton's allegations would satisfy the requirement to show adverse action or inaction by counsel as a result of the conflict. Although in conflict of interest cases, it is not necessary to demonstrate the level of prejudice required under *Strickland* v. *Washington*, 466 U.S. 668 (1984), "[s]howing an adverse effect . . . still requires more than mere speculation; the defendant 'must show that [the attorney] might plausibly have pursued an alternative defense strategy, and that the alternative strategy was in conflict with, or may not have been pursued because of, [the attorney's] other loyalties or interests,'" *United States* v. *DeCologero*, 530 F.3d 36, 77 (1st Cir. 2008).

Newton's claim that counsel failed to further impeach Fernandez Rios by questioning him about

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[1] We have considered the other ineffective assistance claims cursorily mentioned in the § 2255 motion, but not developed in the COA request, and determined that a COA is not warranted as to those claims.

the Vega-Leon case does not allege a failure to pursue an alternative defense strategy, but merely alleges that counsel failed to pursue the desired strategy to Newton's satisfaction. *See id.* In addition, the district court record, including the ruling on defendant's related motion *in limine*, contradicts Newton's allegation that counsel's cross-examination of Fernandez Rios was tempered by fear that the witness would repeat his allegations regarding the fee payments.

The request for a COA is *denied* and the appeal is *terminated*.

By the Court:

/s/ Margaret Carter, Chief Deputy Clerk

Certified and Issued
as mandate under
Fed. R. App. P. 41

/s/ _____
Clerk

/s/ [Illegible]
Deputy Clerk

1-27-10

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

LUIS RIVERA-NEWTON,	*	
	*	
Petitioner,	*	Civil No.
v.	*	04-1687 (PG)
	*	
UNITED STATES OF AMERICA,	*	Related to Crim.
	*	No. 98-072 (PG)
	*	
Respondent.	*	

ORDER

Before the Court is Petitioner's "Application for a Certificate of Appealability" (Docket No. 56).

Under the AEDPA, no appeal may be taken from a district court's ruling on a Section 2255 motion unless a district or circuit judge issues a Certificate of Appealability ("COA") based upon a "substantial showing" by the prisoner of "the denial of a constitutional right." 28 U.S.C. §2253(c). Moreover, an appealing petitioner must demonstrate that the issues raised supporting his request for a COA are "'debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."'" *Barefoot v. Estelle*, 463 U.S. 880, 883 n.4 (1983) (alteration in original) (*quoting Gordon v. Willis*, 516 F.Supp. 911, 913 (N.D.Ga. 1980) (*quoting United States ex. rel. Jones v. Richmond*, 245 F.2d 234 (2nd Cir. 1957))). "The necessity for a substantial showing extends independently to

each and every issue raised by a habeas petitioner." *Berthoff v. United States*, 308 F.3d 124, 127-28 (1st Cir. 2002).

A review of Petitioner's motion reveals that it contains exactly the same arguments that were raised in his Motion to Vacate Sentence and the Objections to the Magistrate Judge's Report and Recommendation. *See* Docket Nos. 1, 39 & 42. This Court thoroughly reviewed Petitioner's arguments and found them to be without merit. *See* Docket No. 47. In other words, Petitioner is simply rehashing claims already considered and denied by this Court on more that one occasion. What is more, Petitioner fails to make a substantial showing that would comply with *Barefoot* and warrant the issuance of the COA. Accordingly, the application for a COA (Docket No. 56) is hereby **DENIED**.

SO ORDERED.

In San Juan, Puerto Rico, May 12th, 2009.

S/ JUAN M. PÉREZ-GIMÉNEZ
JUAN M. PÉREZ-GIMÉNEZ
SENIOR U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS RIVERA-NEWTON,	*	
	*	
Petitioner,	*	Civil No.
v.	*	04-1687 (PG)
UNITED STATES	*	Related to Crim.
OF AMERICA,	*	No. 98-072 (PG)
	*	
Respondent.	*	

OPINION AND ORDER

Before the Court is the "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence" filed, through counsel, by Luis Rivera-Newton ("Petitioner" or "Petitioner Rivera-Newton"). Pursuant to 28 U.S.C. § 636(b), and an Order of the Court in implementation thereof, this case was referred to a Magistrate Judge for proposed findings and recommendation. On March 6, 2006, the Report and Recommendation ("R & R") of the Magistrate Judge was filed, to which Petitioner filed objections on March 30, 2006. After reviewing the R & R findings in light of Petitioner's objections, this Court adopts the Magistrate's R & R, as modified below.

I. BACKGROUND

On April 23, 2001, a jury convicted Petitioner of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine, more than one

kilogram of heroin, and multiple kilograms of marihuana, all in violation to of 21 U.S.C. § 846. (Crim. D.E.[1] 110). On August 31, 2001, the U.S. Probation Office filed a Presentence Report ("PSR"). (Crim. D.E. 539). On September 18, 2001, the United States objected to the PSR arguing that, pursuant to U.S.S.G. § 2D1.1(b)(1), Petitioner's base offense level should be increased by two additional levels for the use of a firearm. (Crim. D.E. 549). Petitioner also objected to the PSR's calculations on October 2, 2001, asserting that he should not be sentenced under the murder enhancement of U.S.S.G. § 2D1.1(d)(1), and that he should not receive a role enhancement under U.S.S.G. § 3B1.1(b). (Crim. D.E. 551). On October 12, 2001, Petitioner was sentenced to life imprisonment and ten (10) years of supervised release. (Crim. D.E. 555).

The conviction and sentence were affirmed on direct appeal. *United States v. Luis Rivera-Newton,* 326 F.3d 253 (D. Puerto Rico 2003).

On July 7, 2004, Petitioner, through Linda Backiel, Esq. (same counsel who represented him on appeal), filed motion to vacate, set aside or correct judgment under 28 U.S.C. § 2255. (D.E.[2] 1). The Court referred the matter to Chief Magistrate Judge Justo Arenas for a Report and Recommendation

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[1] Crim. D.E. is an abbreviation for criminal case docket entry.

[2] D.E. is an abbreviation for docket entry.

("R & R"). (D.E. 5). Chief Magistrate Judge Arenas recommended dismissal of the Petition and informed the parties that if they objected to any portion of his recommendation, they must file written objections within ten days after being served with a copy of his recommendation. (D.E. 39). On March 30, 2006, Petitioner filed objections to the R & R. (D.E. 42)[3]. To the extent not modified by this Opinion, the Court adopts the Magistrate Judge's R & R.

II. STANDARD OF REVIEW

The Court's standard of review for a Magistrate Judge's Report and Recommendation depends upon whether a party files objections. If a party does not object to the Report and Recommendation, the Court does not need to conduct a review by any standard, and a party's failure to assert a specific objection to a report and recommendation irretrievably waives any right to review by the district court and the court of appeals. *Santiago v. Canon, U.S.A., Inc.*, 138 F.3d 1, 4 (1st Cir. 1998); *United States v. Vega*, 678 F.2d 376, 379 (1st Cir. 1982) ("There can be no appeal from a magistrate's report and recommendation unless objections are filed thereto."). If a party does object to

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[3] Petitioner submitted a twenty-seven page objection to the Magistrate's report, two (2) pages in excess of the maximum length allowed without requesting leave to file his motion in excess of said length. *See*, Local Rule 7.1(e). Although Petitioner had to strictly adhere to the twenty-five page limit, the Court decided to entertain the objections.

portions of the Report and Recommendation, the Court reviews those portions *de novo*. *Jasty v. Wright Medical Technology, Inc.*, 528 F.3d 28, 33 (1st Cir. 2008). The Federal Rules of Civil Procedure dictate this standard of review in Rule 72(b), which states, in relevant part:

> The district court to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, or any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed.R.Civ.P. 72(b).

The relevant statute, 28 U.S.C. § 636(b)(1), provides that when a party objects to a magistrate judge's recommendation on a matter, the district court "shall make a *de novo* determination of . . . [the] recommendation[ ]." The district court "may accept, reject, or modify, in whole or in part, the . . . recommendation[ ] made by the magistrate judge." § 636(b)(1). And, in conducting its *de novo* review, the district court "may . . . receive further evidence [on] the matter." § 636(b)(1).

If the Court accepts a Report and Recommendation, the Court is not required to state with specificity what it reviewed; it is sufficient for the Court to state that it engaged in a *de novo* review of

the record and adopts the Report and Recommendation; 12 Wright, Federal Practice § 3070.2.

III. DISCUSSION

The Court is of the opinion that the conclusions of the Magistrate Judge are correct and the objections by Petitioner Rivera-Newton are without merit.

Section 2255 allows a convicted person being held in federal custody to petition the sentencing court to vacate, set aside or correct a sentence. A properly filed motion under Section 2255 must allege that; (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the sentencing court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *See,* 28 U.S.C. § 2255. Accordingly, Section 2255 permits a court to afford relief "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255; *Hill v. United States,* 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962). Even an error that may justify a reversal on direct appeal will not necessarily sustain a collateral attack. *See United States v. Addonizio,* 442 U.S. 178, 184-85, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979). Habeas review is an extraordinary

remedy, and a Section 2255 motion simply is not a substitute for a direct appeal. *Bousley v. United States,* 523 U.S. 614, 621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Similarly, a federal prisoner may not use § 2255 as a vehicle to circumvent decisions made by the appellate court in a direct appeal. *United States v. Frady,* 456 U.S. 152, 165 (1982); *Doe v. United States,* 51 F.3d 693, 698 (7th Cir. 1995). Accordingly, in a § 2255 motion, a defendant cannot raise: "(1) issues that were raised on direct appeal, absent a showing of changed circumstances; (2) nonconstitutional issues that could have been but were not raised on direct appeal; . . . and (3) constitutional issues that were not raised on direct appeal, *unless* the section 2255 petitioner demonstrates cause for the procedural default as well as actual prejudice from the failure to appeal." *Belford v. United States,* 975 F.2d 310, 313 (7th Cir. 1992) (emphasis in original). The parties are not prejudiced in any way by the lack of another opportunity to reargue their case.

Petitioner listed a number of issues under 28 U.S.C. § 2255 in pursuit of habeas relief. Many of these issues are similar, if not the same. Petitioner raises the following grounds for relief, some of which were considered and rejected on direct appeal and are hereby presented under a different label:

1. Petitioner alleges that his due process rights were violated by the Government's failure to disclose and concealment of exculpatory evidence regarding witnesses.

2. Petitioner alleges that trial counsel suffered from actual and potential conflicts of interest which afforded counsels performance, depriving him of his Sixth Amendment right to the assistance of counsel and, further claims, that, even without a conflict of interest, counsel's performance was so deficient as to deprive him of his Sixth Amendment right.

3. Petitioner alleges that counsel failed to assert and protect his right not to be placed twice in jeopardy for the same offense.

4. Petitioner raises that his sentence was imposed in violation of *Blakely v. Washington*.

5. Petitioner claims that the Government relied on facts it knew or should have known to be false.

On direct appeal, Petitioner raised the following arguments:

1. The district court improperly admitted statements of co-conspirators.

2. The district court erroneously excluded evidence of his prior acquittal in state court for a multiple homicide that formed an integral component of the government's conspiracy case.

3. His attorneys labored under an impermissible conflict of interest.

4. The district court erroneously calculated his offense level under the sentencing guidelines.

Even though Petitioner has cast the conflict of interest argument under the rubric of ineffective assistance of counsel, the Court of Appeals addressed and rejected this claim. In a collateral attack, a Petitioner may not litigate again issues already raised and rejected on direct appeal nor new issues that could have been, but were not, raised in direct appeal, absent an intervening change in the law. *Davis v. United States,* 417 U.S. 333 (1974); *Singleton v. United States,* 26 F.3d 233, 240 (1st Cir. 1993).

This Court finds that the Magistrate Judge thoroughly addressed Petitioner's contentions. The record must disclose error of constitutional dimension that deprived Petitioner of a fair trial in order to make out a due process violation. The trial record does not reveal that the trial was unfair and, the alleged trial errors, considered collectively, are not of constitutional dimension.

Petitioner filed objections to the Magistrate Judge's Report and Recommendation and highlighted deficiencies in its draftsmanship. In his lengthy objection memorandum, Petitioner brought to the attention of the Court a number of errors. The Court concurs with the Magistrate Judge's Report and Recommendation in all material respects. However, the Court makes the following modifications, *see* 28 U.S.C. § 636(b)(1)(C), which are not material to the Court's decision. These errors include the following:

First, Petitioner takes issue with the word "arguably" as used in the Magistrate's R & R, referring by

page to every instance where the word "arguably" is used and then purporting to object to these statements. In general terms, Petitioner states in relevant part: *"The Report presents Petitioner's assertions, qualified as such in part I ("Procedural Background") as 'arguably. . . .' Petitioner requests that this modifier be struck in each and every instance, [. . .]. When 'arguably' modifies a conclusion or a legal proposition, [] 'Petition argues that' should be substituted."* *See*, Petitioner's Objections, Page 1, paragraph 4. (D.E. 42).

Second, in reference to page four, line 9, of the R & R, Petitioner asserts: *"In order to avoid unnecessary confusion, counsel's name should be corrected. It is 'Edgar' Vega Pabón, not Jorge." See,* Petitioner's Objections, Page 2. (D.E. 42). This is a misnomer that does not prevent impair review.

Third, in reference to page five, line 9, Petitioner alleges: *"'Petitioner' should be changed to 'Mr. Fernández Ríos'". See,* Petitioner's Objections, Page 2. (D.E. 42).

Fourth, in reference to page fourteen, line 21, of the R & R, Petitioner states: *"A typographical error converted 'context' into 'contest'". See,* Petitioner's Objections, Page 5. (D.E.).

The Court agrees with these objections and modifies the R & R accordingly. We have considered the other objections presented by Petitioner and conclude that they lack merit. *Eaton v. Angelone,* 139 F.3d 990, 995 (4th Cir. 1998) (The Court refuses to

transform a federal habeas proceeding into a second trial).

Accordingly, with these modifications and after due and proper consideration of all pleadings in this file, and a *de novo* determination of those portions of the Report and Recommendation to which objection is made, it is **ORDERED** that the Report and Recommendation of the Magistrate Judge is hereby **ADOPTED,** as **MODIFIED** above. A final judgment dismissing this case with prejudice will issue by separate document.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 8th of September, 2008.

JUAN M. PÉREZ-GIMÉNEZ
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS RIVERA-NEWTON,	*	
	*	
Petitioner,	*	Civil No.
v.	*	04-1687 (PG)
UNITED STATES	*	Related to Crim.
OF AMERICA,	*	No. 98-072 (PG)
	*	
Respondent.	*	

JUDGMENT

For the reasons set forth in our Opinion and Order of even date, it is hereby Ordered and Adjudged that Petitioner's Objections (D.E. 42) be DENIED, the Report and Recommendation (D.E. 39) is adopted as modified in the Opinion and Order, and Petitioner's Motion to Vacate, Set Aside, or Correct Judgment (D.E. 1) is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 8th of September, 2008.

JUAN M. PÉREZ-GIMÉNEZ
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS RIVERA-NEWTON, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CIVIL 04-1687 (PG) (CRIMINAL 98-0072 (PG))

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

PROCEDURAL BACKGROUND

On April 21, 1998, a grand jury sitting in Puerto Rico returned an indictment charging Edsel Torres Gómez, known as Negri, the leader of a violent drug trafficking organization which controlled several public housing projects in the Caguas area. The indictment was superceded on October 16, 1998 and again on May 5, 1999. In the second superceding indictment, petitioner, also known as "Luis El Mono" was included for the first time, along with co-defendant Luis (Francisco) Fernández Ríos. On June 2, 1999, petitioner Luis Rivera Newton, Negri's right-hand man, was charged in a third superceding indictment with seven others with participating in a conspiracy to possess with intent to distribute in excess of five kilograms of cocaine, more than one kilogram of heroin, and multiple kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

(Criminal No. 98-0072(PG), Docket No. 110.) The government alleged that petitioner was part of an organization that operated drug points for each substance that sold heroin and cocaine from 1993 to October 17, 1997. The court of appeals summarizes the evidence in the light most favorable to the verdict as follows: "The evidence at trial described Rivera Newton's involvement in a "hub-and-spoke conspiracy" to distribute multi-kilogram quantities of cocaine, heroin, and marijuana from the early months of 1989 to April 8, 1998. The drugs were sold at specialized distribution points for each substance ("drug points") primarily located within the Gautier Benítez Housing Project ("Gautier Benítez") in Caguas, Puerto Rico. While the drug points were managed by different individuals, every distribution point in Gautier Benítez was ultimately controlled by Edsel Torres Gómez (a.k.a. "Negri"), the de facto "hub" of the conspiracy. At trial, the government portrayed Rivera Newton as Negri's right-hand man and presented witnesses who testified to Rivera Newton's role as a conduit between Negri and lower-level members of the conspiracy. Negri also entrusted Rivera Newton with various high-level responsibilities such as counting the money received in drug transactions and testing the quality of the drugs purchased from other dealers." *United States v. Rivera-Newton*, 326 F.3d 253, 255 (1st Cir. 2003) (footnote omitted).

On April 2, 2001, the case was called for jury trial and the petitioner, represented by attorneys Edgar

Vega Pabón and José Andreu Fuentes, was convicted on April 16, 2001. On April 23, 2001, petitioner filed a motion for new trial. (Docket No. 492.) The government opposed the motion on May 1, 2001 (Docket No. 504) and the court denied the motion on February 5, 2002. (Docket No. 578.) Petitioner was sentenced to life imprisonment on October 12, 2001. He also received a term of supervised release of ten years. Petitioner appealed his conviction and the same was affirmed. *United States v. Rivera-Newton,* 326 F.3d 253 (1st Cir. 2003).

Petitioner presses before the court five grounds for vacating his sentence.

FIRST GROUND: NONDISCLOSURE (*BRADY* VIOLATION)

> Movant's due process rights were violated by the prosecution's failure to disclose and concealment of exculpatory evidence regarding witnesses, including César Escobar, Francisco Fernández Ríos, William Del Valle and others.

Petitioner argues that his conviction was the result of violations of his right to due process in that the prosecution failed to disclose and concealed information favorable to the defense which it was required to disclose with respect to the following witnesses: César Escobar Vázquez, Francisco Fernández Ríos, known as Frank El Viejo, and William del Valle. Petitioner argues that the United States failed to

disclose that Francisco Fernández Ríos, a testifying co-defendant, was the person who conspired and intended to purchase about 50 kilos of cocaine which resulted in the arrest and trial of three people in another case in this court, *United States v. José Antonio Soto Mercado,* Criminal No. 96-0263(HL). Francisco Fernández Ríos was never arrested, charged or convicted in that case. Petitioner argues that the United States knew of the actions of Francisco Fernández Ríos because as part of a plea agreement, he was required to divulge such information. Prior to trial, the United States informed the court that Francisco Fernández Ríos had paid attorney's fees in the case of Ismael Vega León, which revelation was provoked by trial counsel Jorge Vega Pabón's recollection that there was a "Frank el Viejo from 172" who was never arrested in that case, a case which involved a reverse sting. Ismael Vega León was arrested in *United States v. Soto Mercado,* Criminal No. 96-0263(HL), involving a conspiracy to obtain about 50 kilos of cocaine. It was also revealed that the person with whom the agents were negotiating to purchase the 50 kilos of cocaine was Francisco Fernández Ríos. Petitioner proffers that at a hearing, Ismael Vega León would testify that the money in his possession at the time of his arrest was to be used by Francisco Fernández Ríos to purchase drugs. Francisco Fernández Ríos paid Ismael Vega León's legal fees because he escaped liability, while Ismael Vega León went to jail for 125 months and suffered criminal forfeiture. This undisclosed information by Francisco Fernández Ríos arguably constitutes both a

prior bad act and an additional benefit received or expected from the government. Petitioner argues further that this was information that was supposed to be turned over in conformity with the requirements of *Brady v. Maryland,* 373 U.S. 83 (1963). Petitioner stresses that while Francisco Fernández Ríos did not have a written plea and cooperation agreement, he obviously had some kind of immunity for the crimes he disclosed, and there was some kind of agreement that his attorney had with the prosecution regarding his cooperation. Petitioner argues that none of this was disclosed and none of this information was available at trial. Rather Fernández Ríos testified that he had no agreement with and received no benefits from the prosecution. Petitioner was arguably not testifying exclusively with the hope of reducing his sentence in one case, that is, *United States of America v. Francisco Fernández Ríos, et al.,* Criminal No. 97-0173 (SEC), in which he had already been sentenced, with no agreement or expectation as to his sentence in this case as a result of testifying against petitioner, as the jury was lead to believe.

Fernández Ríos, a/k/a "Papa Pitufo" was, by his own admission, the principle supplier of drugs to the conspiracy. His loss of the proceeds from his sales to Negri resulted in the four murders on March 14, 1994. His testimony about the quantity of drugs he delivered to the conspiracy was critical to the court's sentencing determination. There was arguably no corroboration of his testimony. The full dimension of the benefits he hoped and expected to receive, was

evidence critical to impeaching his credibility. Fernández Ríos arguably also had an undisclosed state conviction. He testified that he had a 1975 bank robbery and a 1979 weapons offense. Apparently the 1979 offense was a violation of his Federal Youth Corrections Act sentence in 1974, because at the time of his arrest in this case, it appears that he was a state prisoner. Petitioner argues that it is highly unlikely that he was still serving a sentence for a 1979 offense, even if it constituted a violation. There is therefore apparently an undisclosed additional conviction.

Petitioner argues that he was prejudiced by the suppression of the documents and other evidence of additional criminal acts and additional benefits, agreements or expectation.

Under *Brady,* and *Giglio v. United States,* 405 U.S. 150 (1972), *United States v. Bagley,* 473 U.S. 667 (1985), *Kyles v. Whitley,* 514 U.S. 419 (1995) and *Smith v. Phillips,* 455 U.S. 209 (1982), petitioner argues, the prosecution has a duty to disclose information about the prior criminal acts of one of its witnesses, regardless of whether it is specifically requested. The standard for "materiality" is defined in *Kyles v. Whitley,* 514 U.S. at 434, as evidence that creates a "reasonable probability" that the result of the trial would have been different had the suppressed information been provided.

William del Valle testified that in 1993 or 1994 he was convicted of a felony weapons violation, but

that while he was on bail for that offense he was charged and ultimately convicted of attempted car theft. In addition, he admitted, he had another weapons violation and a domestic violence conviction. According to the Puerto Rico court's computerized printouts (not available at the time of trial), del Valle had active cases in Bayamón, Carolina and Caguas during 1994-1996, including weapons law violations in Bayamón, and in Carolina.

Because he began to co-operate with the government while jailed in January, 1995, and was immediately afforded privileges of the witness protection program, his weapons and spouse abuse arrests arguably constituted a violation of the conditions of his remaining in the program. However, he was not removed from the program and was arguably not convicted of one or more offenses, some not disclosed to the defense, because of his status as a witness.

William del Valle had two other significant arrests in 1994, at least one of which was not disclosed. The first was an armed car-jacking at the residence of a judge barely two weeks before the events he testified about, i.e. on February 27, 1994. This arrest was not disclosed to the defense. His other car theft arrest was made by the Municipal Police of San Juan less than six months after the events he testified about, on August 6, 1994. This might have been an "attempted car theft."

The arrests arguably place his testimony in the context of a witness who was seriously, if not

habitually involved in crime, and not a casual impartial eye-witness observer of the events at Gautier Benítez. In addition, del Valle was arguably incarcerated on a new charge, not related to any of the 1994, 1995 or 1996 arrests. That charge does not appear on any available record of cases, and is believed to have been made pursuant to a false name and/or social security number.

Arguably had del Valle's entire criminal history been available to counsel who attempted to impeach him on the grounds of motive and bias as well as his prior history, the jury is not likely to have credited his testimony about petitioner's possession of a .38 and a red gas can which he was "spreading" on the torture victims. This was arguably the only evidence which could support the prosecution's arguably improper rebuttal argument to the effect that petitioner was, in fact, guilty of the murder of the three Cayey victims. It was also the evidence cited by the court in support of its decision to impose a sentence according to the murder guideline, and to apply the weapons enhancement guideline.

SECOND GROUND: SIXTH AMENDMENT VIOLATION

Trial counsel suffered from conflicts of interest which affected counsel's performance, depriving Movant of his Sixth Amendment right to the assistance of counsel. In addition, even without the conflicts, counsel's

performance was so deficient as to deprive Movant of his Sixth Amendment right.

Attorney Edgar Vega Pabón arguably suffered from an actual conflict of interest because of his prior representation of a client (Ismael Vega León) whose legal fees were paid by prosecution witness Francisco Fernández Ríos, a fact that Fernández Ríos disclosed to the prosecution and attorney Vega Pabón shortly before he was to testify. Petitioner does not assert that attorney Vega Pabón knowingly received drug proceeds. In fact, Ismael Vega León had two trial counsel, and the proceeds might have been paid directly to the other counsel. *See* Criminal No. 96-0263 (HL). This arguably does not eliminate the conflict created by the prosecution's raising of these issues on the morning that Fernández Ríos was to testify, and attorney Vega Pabón's understandable concern about their impact.

The prosecution's insistence that the district court ask petitioner if he wished to change lawyers, (he indicated that he did not), and the colloquy conducted were arguably insufficient to waive the conflicts of interest here, in light of information discovered after trial and the relation between that conflict and counsel's failure to provide effective assistance.

Fernández Ríos arguably used one "Johnny Adams" to deliver over $20,000 in cash to an office in or near Caguas for subsequent delivery to an attorney for Vega León during 1996, following his arrest in

Criminal No. 96-0263 (*United States v. Antonio Soto Mercado*). A review of the docket reveals that Fernández Ríos was never arrested or charged in connection with that case. According to petitioner, his payment of legal fees for Vega León was not the disinterested act of a philanthropist. It is believed by petitioner that Fernández Ríos was the true target of the "reverse sting" in which Ismael Vega León was arrested along Highway 172.

When Vega León was arrested, he was arguably mistaken for Fernández Ríos because he was in possession of money destined for Fernández Ríos who intended to purchase narcotics from the undercover officers. Fernández Ríos clearly faced a significant sentence for that case, a case in which he was never charged. Petitioner argues that if it is true, that the "Frank" or "El Viejo" referred to by the parties in the colloquy about Fernández Ríos prior to trial (*see* Exhibit B, at 27-57) is, in fact, Fernández Ríos, the fact that he escaped liability for that case is arguably an additional significant benefit he reaped in exchange for his co-operation, as Ismael Vega León was sentenced to 125 months and criminal forfeiture in Criminal No. 96-0263 (HL).

Petitioner argues that there is a significant likelihood that either Fernández Ríos obtained an additional benefit for his testimony which was never disclosed to the defense or the jury, or he lied to the United States in his debriefings by failing to disclose his role in that case.

Attorney Vega Pabón was precluded by his obligation to Ismael Vega León from using any of the information obtained from his prior client to cross-examine Fernández Ríos on the issue of his additional drug dealing in relation to the case for which Vega León was convicted, his additional benefit the result of his co-operation, or whether he had been truthful with the United States in his debriefing, and/or about his relation to the incident for which Vega León was being sentenced. According to petitioner, this combination of facts impaired attorney Vega Pabón's representation throughout the trial.

First, trial counsel moved in limine to prevent testimony about what would damage his personal reputation (testimony about the other 20 kilos going to Ismael Vega León for payment of legal fees), but failed to move to exclude testimony damaging to his client Rivera Newton-about the payment of his legal fees with drug proceeds. Even assuming some relevance to testimony about Fernández Ríos' visit to petitioner's store after the Cayey murders for the purpose of contacting "Negri," there was no special relevance to the fact he was attempting to deliver money to pay his legal fees. That information was arguably clearly more prejudicial than probative, and should have been excluded from petitioner's trial. Because of attorney Vega Pabón's personal conflict on account of Fernández Rios' payment of legal fees of a different client, he failed to move to protect Rivera Newton's interest at trial. The fact that a co-operating witness had engaged in additional criminal

activity, particularly if he had never been charged for that offense, is arguably exculpatory evidence which must have been turned over, and was an important basis for cross-examination. However, attorney Vega Pabón made no effort to inquire about Fernández Rios' escape from liability in connection with the Vega León case, either by way of seeking discovery from the prosecution, a continuance to investigate, or cross-examination.

Attorney Vega Pabón's double conflicts (concern about his own reputation and his duty to a prior client) arguably adversely affected his performance by handicapping his cross-examination of a critical prosecution witness, who testified that he had yet to receive virtually any benefit for his testimony.

The conflict arguably also created a serious disincentive to cross-examine Fernández Ríos about his alleged delivery of drug proceeds, via a contact with petitioner at his store, for the purpose of paying legal fees in the local trial. Probing cross-examination in this area arguably risked provoking testimony from Fernández Ríos not just about the 20 kilos delivered via petitioner, but the half of that 40-kilo consignment, which Fernández Ríos alleged in counsel's office and/or was used to defend another of his clients.

Fernández Ríos' testimony was central to the prosecution's case. Attorney Vega-Pabón's cross-examination about Fernández Ríos criminal history and drug dealing was arguably cursory. The jury

arguably was left virtually ignorant of the magnitude of Fernandez Rios' drug-dealing empire and his desperation to escape the 30-year sentence provisionally imposed in Criminal No. 97-0173, and the relation of the facts of that case to this one.

Counsel Andreu Fuentes also arguably suffered from a conflict of interest, the result of his having represented both petitioner and his brother, as well as others accused during the state proceedings. Not only is this a "conflicting loyalties"/potential conflict of interest, but it created an actual conflict in this case because of Fernández Ríos' trial testimony that he secured drugs to pay legal fees for the local case, and delivered them to petitioner and his brother.

Petitioner argues that the conflict is two-fold, involving both a conflict between an attorney's loyalty to his former clients and his present client, and between his duty of vigorous advocacy and his concern for his own personal reputation and status. In the case of counsel Andreu Fuentes, the actual conflict raised was even more acute because testimony about the use of drug proceeds delivered to petitioner to pay counsel's fees was part of the trial evidence, and the prosecution explicitly argued that petitioner's relation to the Caguas attorney who represented another codefendant in the state proceedings, attorney Ramón Delgado, who prepared or certified some business documents presented at trial, was evidence of his participation in the conspiracy.

Attorney Andreu Fuentes was in a position to transmit critical evidence and information to attorney Edgar Vega Pabón in order to impeach key witnesses on the basis of contradictions between their statements in that trial and this, and share the benefits of his knowledge of the local proceedings and investigation.

For example, he could have used or provided for counsel Vega Pabón to use the fact that at petitioner's trial, witnesses in this court declared that they had seen petitioner and his brother, Miguel Rivera Newton at the scene of the interrogation of the victims, when he had documentary evidence, used in the local trial, demonstrated that Miguel Rivera Newton was in Florida on March 13-14, 1994. He also could have, on the basis of his knowledge of the prior representation of Miguel Rivera Newton, developed a theory of defense based upon the fact that Miguel, not Luis, was the significant figure in the Gautier Benítez business and Luis a mere "tagalong." There were arguably failures that contributed to petitioner's being deprived of his Sixth Amendment right to counsel at trial, some of which are the result of the conflicts of interest, and others of which do not appear to be.

William del Valle's grand jury testimony makes it clear that he was no mere observer of the crimes around him. Petitioner argues that despite Del Valle's significant drug consumption, he was never questioned about the possibility of mistaken identification or confronted with photographs of other members of

the drug organization introduced in evidence in the organizational chart based upon his testimony.

Petitioner argues that counsel conducted no cross-examination regarding del Valle's motivation to accuse petitioner, and about his relation to the criminal activity at Gautier Benítez and elsewhere, to help the jury put him and his testimony in the contest of his personal loyalties and animosities within that world. Rather, he was allowed to appear as a repentant former addict whose wife managed to keep him out of the criminal affairs around him. Petitioner also argues that it is obvious from his admission that he only agreed to co-operate after his wife had been placed in the Witness Protection Program and his friend (Orta) had been hung in jail by people he associated with "Negri," that he had scores to settle with people associated with "Negri," and petitioner's local and federal charges gave him a way out of jail, a way out of the housing project, and a way to settle those scores.

None of this personal motivation for falsely testifying that he saw petitioner with a gas can forcing the kidnap victims to drink, or, as modified, "spreading" gasoline on them, was developed at trial by the attorneys. Petitioner argues that he was not even asked about his two social security numbers.

Petitioner notes that there were two principle groups of witnesses who participated in this investigation: those who were in the Witness Protection Program (including del Valle and his family, Nilda

Díaz Rodríguez the paid confidential informant whose dramatic narration, leaked to El Vocero newspaper, about the massacre foreshadowed the testimony of del Valle, and others, and those who were in federal custody and housed in the MDC unit reserved for co-operating defendants (César Escobar, Fernández Ríos, Pérez Alicea, Calderón Hernández and Ángel Jiménez Rosado, among others), as well as some who were at some time in one or the other, or both, such as Anthony Garay. Both groups had ample opportunity to meet, discuss and conform their testimony.

Another important area of cross-examination and defense theory arguably foregone by both attorneys was with regard to the contamination of the witnesses jailed at MDC. For example, the defense knew that Ángel Rosado had asked Fernández Ríos to read his grand jury testimony and conform his version of the events (including that victims were forced to drink gasoline) in order to make it more "believable." While Fernández Rios rejected the invitation, the defense failed to question César Escobar, who followed Rosado's script about his opportunity to meet with Rosado. In addition, a sworn statement turned over in discovery from Ángel Ruiz Adorno ("Ratón") indicates that while at the Metropolitan Detention Center, he discussed the Cayey murder case with trial witness Javier Pérez Alicea, as well as Rosado Jiménez and "Prieto Capota" (Calderón Hernández).

Petitioner argues that the failure to cross-examine about the relations between various groups of witnesses and their opportunity and motives to

discuss their testimony and conform it left the jury with the impression that there were six independent witnesses with no axe to grind who all had unimpeachable evidence against petitioner. Arguably, counsels' failure to attempt to demonstrate that this was far from the truth left petitioner virtually defenseless.

Trial counsel failed to object to a highly improper rebuttal argument to the effect that petitioner had actually shot one of the Cayey victims with a .38, an argument that was an invitation for the jurors to convict him because he "acted like" a person involved in a group of narco-traffickers.

Counsel failed to file critical pre-trial motions, and raise and preserve trial and sentencing errors, including, but not limited to failure to move to dismiss the indictment for violation of petitioner's rights under the Double Jeopardy Clause and the "*Bartkus*" exception to the "separate sovereignties" exception, failure to challenge the presentence report's quantity calculations and to request a hearing in order to secure a reliable determination of the quantity of drugs for which petitioner should be held personally responsible under the Guidelines and his role in the conspiracy alleged in the indictment, and failure to challenge the calculation of petitioner's sentence on the basis of the murder guideline, in violation of Apprendi, and other errors.

The United States counters the statement and argument in that attorney Vega Pabón rejected parts

of Fernández Ríos' proffer on the record and summarized his interview of Fernández Ríos on the record. According to Fernández Ríos half of the 40 kilograms of cocaine he had received from the Colombian source had gone to Ismael Vega León while the remainder was bound for Negri, who was contacted through his client, petitioner, and petitioner's brother Miguel Rivera Newton. Attorney Vega Pabón agreed with the government's proffer to the effect that Fernández Ríos did not identify which attorneys at the state level allegedly received the drug proceeds, nor did he mention attorney Rámon Delgado. When attorney Vega Pabón identified himself as the attorney for Ismael Vega León, Fernández Ríos told him: "then I paid you also your legal fees." Attorney Vega Pabón argued that he must be mistaken since he had been paid with two certified checks for the amount of $15,000 each from Ismael Vega León's wife, Lourdes, and not with money orders as alleged. The attorney said that he had the checks traced and that he had no role in the state prosecution against petitioner. The defense moved in limine to exclude evidence of payment of legal fees at the state level and the motion was granted since the court determined the matter to be irrelevant. The court also found that there was no conflict in the alleged payments made to attorney Vega Pabón in an unrelated state case.

Petitioner was then addressed regarding the possibility of a conflict of interest in view of the alleged payment made to attorney Vega Pabón with

drug proceeds. Petitioner was advised in detail by the court as to the information related to conflict. Petitioner was fully informed with the information present at the time and was told that if he did not want his attorneys, the jury would not be sworn in, the attorneys would leave, and petitioner would have a reasonable amount of time to prepare for trial, after obtaining new counsel. The district court was meticulous in its inquiry and wanted to assure that petitioner was not pressured in any way. Petitioner himself addressed the court and informed that attorney Andreu Fuentes had been his attorney for a few years and that attorney Vega Pabón had joined in the federal case in 1998. After the dialogue between petitioner and the court, the jury was empaneled.

THIRD GROUND: INEFFECTIVENESS IN RELATION TO DOUBLE JEOPARDY

> Trial counsel failed to assert and protect Movant's right not to be placed twice in jeopardy for the same offense. This case presents an example of a "sham" local proceeding acting in concern and on behest of federal agencies, so as to qualify for the Bartkus exception to the "separate sovereignties" rule.

The prosecution opened its case with the words "On March 13th of 1994 three bodies were found," and promised that "you will hear evidence . . . ladies and gentlemen, [that] he fired that weapon and he shot at someone." No objection was raised, despite the

arguably clearly improper nature of that statement, the lack of any discovery or evidence that petitioner in fact, shot anyone or had a gun on the day of the murders, and despite petitioner's acquittal of precisely those charges following trial in local court.

Petitioner's trial counsel were well aware of the facts that arguably cried out for double jeopardy protection. As trial counsel for petitioner in the local courts, counsel Andreu Fuentes knew petitioner had been tried and acquitted of the murders, and that the prosecution had been using the local trial as a dress-rehearsal for the federal trial. It was evident that the fiction of two separate, independent sovereignties was being manipulated to test theories, witnesses and evidence in local court. Local trial counsel also had access to all the information about the federal involvement in the nominally "local" prosecutions, including the participation of federal prosecutors and agents of the FBI, DEA, and Customs from its inception.

Nonetheless, neither of petitioner's trial counsel arguably made any effort to challenge the constitutional legitimacy of the strategy of a single governmental entity to get two chances to convict petitioner for the Cayey massacre. Had they done so, placing before this court the specific facts regarding what was, in fact, not two separate prosecutions for different offenses by independent sovereigns, but a single seven-year concerted effort, directed by the United States, to punish petitioner for the Cayey murders, the result of his trial would have been

different, according to petitioner. Not only would he not be serving a life sentence because the court believed him guilty of murder, but also without the gory evidence of dousing victims in gasoline, or forcing them to swallow it "to make them explode" and destroy evidence of the murders, and the allegedly improper argument that petitioner fired a .38, killing one of the victims in Cayey, any jury would look skeptically at the largely hearsay evidence presented by seasoned narco-traffickers looking to lighten their sentence, and would have acquitted Rivera Newton.

No motion to dismiss the indictment for violation of the Double Jeopardy Clause of the Fifth Amendment was filed on petitioner's behalf. Neither counsel moved in limine for a ruling on the res judicata or collateral estoppel effect of the prior acquittal, with its underlying factual determinations. And neither moved, pursuant to Rules 401 and 403, Federal Rules of Evidence, for a ruling excluding evidence related to the Cayey murders in light of the not guilty verdict, and the fact that much of this evidence was arguably irrelevant, unreliable, and clearly more prejudicial than probative of the offense charged in the indictment.

While the fact of the acquittal was irrelevant to the charges the jury had to decide, it was arguably highly relevant to legal issues relating to double jeopardy and the scope of the evidence and argument related to the murders that was properly admissible against petitioner, all of which should have been

decided before trial. Had they been, the prosecution would arguably not have been able to argue petitioner was a direct participant or shooter in the murders, and much inflammatory evidence would have been eliminated from what was presented to the jury. Petitioner argues that failure to make such motions and objection cannot be the result of any strategic decision, as there was absolutely no risk of any harm to petitioner from making the motions.

Petitioner argues that under the Double Jeopardy Clause, the Cayey massacre could not be retried before this court. The Fifth Amendment declares that no person shall be subject "for the same offense to be twice put in jeopardy." A lesser-included offense (first degree murder, weapons possession) is the "same" for double jeopardy purposes, as a greater offense of which it may be an element (drug conspiracy carried out by murder with the same weapons). *Brown v. Ohio,* 432 U.S. 161, 168 (1977). Under the standard established in *Blockburger v. United States,* 284 U.S. 299, 304 (1932), a second prosecution is prohibited if all the elements of the first must be relitigated in order to prove the second. Petitioner argues in his motion that in this case prosecution proceeded on the theory that the Cayey massacre was a lesser included offense of the conspiracy charged in count one.

Petitioner argues that all three levels of federal court have held that whatever its limitations, and notwithstanding the doubtful nature and source of any "separate sovereignty" for Puerto Rico, it is a "state-like political entity" that should be treated as if

it were separate and sovereign when federal courts believe this appropriate. *See, e.g., People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937).

In *Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959), the Supreme Court recognized that in specific cases the figleaf of separate sovereignty cannot be stretched to cover the embarrassing lack of separateness. If one prosecution is merely a "sham and cover," for the other, or one prosecutor acting as *de facto* agent of the other, the "separate sovereign" doctrine would not apply because, in fact, there was only one sovereign promoting the prosecution and, in effect, unfairly placing the defendant twice in jeopardy.

Federal arrests early in the process, in some cases as the result of local investigation, arguably created co-operating co-defendants who, under the federal, but not the local system of justice, could reduce their sentences by providing information in both state and federal courts. The first arrest was made in July, 1994, by the Police of Puerto Rico. They arrested Alex Joel Franco Cedeño in connection with the theft of the red Honda Prelude in which the victims were found. It had been stolen from Víctor Sierra Merced on March 11 by him and Luis Ángel Rosado Jiménez ("HULK"), who killed Sierra. Franco Cedeño, initially himself a suspect in the Cayey murders, implicated Rosado Jiménez in Sierra's murder and the theft of his car, and explained how he and Rosado Jiménez sold the car for $250 the next day to Calderón Hernández. Three days later Calderón Hernández and Rosado Jiménez were

arrested on federal warrants in Criminal No. 94-0213 (HL), and held without bail. These charges were not related to the massacre. In his sworn statement of November 23, 1994, Franco Cedeño reported that Rosado Jiménez told him, some time after the massacre, that "they made [the Cayey victims] swallow gasoline." Barely two weeks after that statement, on December 14, 1994, Rosado Jiménez was charged, along with petitioner, his brother, "Negri" and others, with murder, weapons possession and violation of Puerto Rico's Organized Crime Law. On March 12, 1995, Rosado Jiménez and Calderón Hernández were arrested on federal charges in connection with the carjacking. When Calderón Hernández was sentenced to several centuries of incarceration in the local court, the United States dismissed its indictment against him. Petitioner argues that this is merely an example of the permeability of the borders between the two governmental entities in this particular investigation. Because the very same facts the prosecution sought to prove with the testimony of William del Valle regarding petitioner's handling a. 38 and his forcing gasoline on the victims was the heart of the first trial, in which he was acquitted of the Cayey murders, the prosecution was arguably precluded from presenting it again before a different jury.

Petitioner argues that trial counsel had ample personal reasons to avoid the subject of the local trial, their relationship to it, and how much they know about it. Regardless of whether either received any drug proceeds, and regardless of whether either had

any idea where the money came from, if they did, raising their relationship to petitioner's state case for any reason risked increasing their personal vulnerability: to disqualification, investigation or sanction by the local bar, this court, local and federal tax and investigative agencies. Merely acknowledging participation in the state trial, given the nature of the testimony about payment of legal fees and Delgado's distribution of them, was arguably sufficient to lead an attorney to be concerned about damage to his professional and personal reputation as well as prejudice the jury against the lawyer, as well as the client.

Counsel Andreu Fuentes arguably had particularly strong incentive to avoid the issue of his participation at the local trials, as the prosecution clearly sought an inference that he was a recipient of the drug proceeds about which Fernández Ríos testified, and the drugs were delivered to his client after his arrest. He was also in a uniquely well-informed position to understand the double jeopardy, collateral estoppel and related issues.

Making the double jeopardy argument on behalf of petitioner arguably would highlight attorney Andreu Fuentes' role as Miguel's counsel, and draw him into the circle of those suspected of receiving payment from Hernández.

FOURTH GROUND: SENTENCING ERRORS

Petitioner argues that there are three interrelated issues which rely upon a common body of

facts in relation to sentencing errors. Petitioner discusses them together as follows:

1. At the time of trial and sentencing, the prosecution and court treated the issue of drug quantity, but not the murders, as one governed by *Apprendi.*

2. The prosecution opened its case with the words "On March 13th of three bodies were found." It closed with "we are not trying the Cayey massacre."

3. During the jury instruction conference, the defense requested special verdict on murder which was refused. The defense made no objection, however, to the jury instruction as given.

4. The prosecution requested a special verdict on the nature and quantity of drugs as alleged in the indictment, specifically in order to argue at sentencing petitioner should be punished for Cayey massacre. Without the special drug quantity instruction, the prosecutor argued,

> "We would be able to request at the time of sentencing but the court would not be allowed to tell by law, to sentence him beyond 40 years which would be in contradiction by our request that he be found guilty as participating in the Cayey massacre . . . "

5. The court granted the prosecution's requests and denied those of the defense.

6. Following the guilty verdict, which included an affirmative answer to the questions about the amounts of each of the three controlled substances identified in the indictment, trial counsel objected to the Presentence Report's cross-reference to the murder guideline, to the prosecution's proposed increase for leadership role and its drug quantity calculations.

7. This court made alternate sentencing findings. It affirmed the cross-reference to the murder guidelines, USSG § 2D1.1(d)(1) (by a preponderance of the evidence) on the basis of the testimony of William del Valle about observing petitioner with a red gas can, moving it up and down in the vicinity of the victims for 10-15 minutes.

8. The court determined that petitioner played a leadership role on the basis of Fernández Ríos' testimony about going to his store to find Negri while trying to deliver drugs to be sold to pay counsel's fees, the testimony of del Valle and others about his working at a processing table or accompanying "Jimmy Peligro" (Escobar, Pérez Alicea), and thus attributed all the drugs Fernández Ríos testified he distributed to Negri to petitioner. This resulted in a base offense level of 38, pursuant to § 2D1.1(c)(1). In addition, the court enhanced that level for the use of weapon to facilitate the conspiracy in part on

the basis of del Valle's testimony about petitioner's having a .38 the night before the murders and evidence that one of the victims was killed by a .38. An additional enhancement was made for leadership role.

9. Trial counsel did not contest or contradict the factual basis for any of these determinations, nor to argue that they violated petitioner's rights under the Fifth and Sixth Amendments.

10. The court of appeals affirmed the sentence exclusively on the basis of the cross-reference to the murder guideline, declining to decide the drug quantity and leadership enhancement issues.

FIFTH GROUND: FALSE FACTS/TESTIMONY

The prosecution relied upon argument and facts it knew, or should have known were false regarding petitioner's participation in the Cayey murders, about at least one of the cocaine deliveries about which Fernández Ríos testified, about his agreement with the prosecution, and others.

1. The version of the facts relating to petitioner's giving gasoline to the victims to drink.

When confronted by a direct contradiction on this point between Fernández Ríos and Rosado Jiménez, the prosecution determined, by way of polygraph, that Rosado Jiménez' testimony was false. The prosecution presented testimony to exactly that effect. It

apparently conducted no examination to determine what other witnesses were contaminated by Rosado Jiménez' effort to sage-manage petitioner's trial.

2. The prosecution failed to correct erroneous testimony by Fernández Rios when he attributed some of his other drug dealings to this conspiracy.

Knowing the true relation between these suppliers would have given the jury a more realistic understanding of their common sources of information and contacts and the actual amount of drugs destined for Gautier Benítez, as opposed to Fernández Ríos huge' and far-flung drug empire. It also appears that an exploit narrated by Fernández Ríos as part of his deliveries to the Torres Gómez conspiracy actually took place in July, 1994 and the drugs were destined for others. The government failed to correct false and unreliable testimony regarding petitioner's presence and participation in the murders.

The prosecution also knew, or should have known, that testimony identifying petitioner and his brother as present during the nights of March 12 and 13, or from witnesses who had previously identified both as present at that time, was unreliable because petitioner's brother had presented proof during the state proceedings that he was in Florida at that time. Merely erasing him from the picture does not cure the unreliability of the testimony that put him in it.

Finally, the prosecution relied upon evidence and arguments it knew, or should have known, was

unreliable with respect to petitioner's using a .38 to shoot the victims and introducing the gas nozzle into evidence and arguing petitioner used it to give gas to the victims when there was no reliable evidence that petitioner had a .38 at any time, and none that he had any weapon on March 13, 1994, and this testimony was contrary to that of Fernández Ríos who witnessed the shooting and attributed it to Hugo LaSanta, who pled guilty to this indictment, and there was no reliable chain of custody for the bullets, or the gas spout, and testimony at the local trial indicated that the one found at the scene and/or introduced in the local trial was a different color than the one introduced here, and when no red gas can, or gas can of any kind was found at the scene.

DISCUSSION

Under section 28 U.S.C. § 2255, a federal prisoner may move for post conviction relief if:

> the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. . . .

28 U.S.C. § 2255; *Hill v. United States,* 368 U.S. 424, 426-27 (1962); *David v. United States,* 134 F.3d 470, 474 (1st Cir. 1998).

Collateral attack on nonconstitutional and nonjurisdictional "claims are properly brought under section 2255 only if the claimed error is 'a fundamental defect which inherently results in a complete miscarriage of justice' or 'an omission inconsistent with the rudimentary demands of fair procedure.'" *Knight v. United States,* 37 F.3d 769, 772 (1994) (quoting *Hill v. United States,* 368 U.S. at 428).

It is well settled that the Sixth Amendment right to counsel guarantees effective counsel. *See, e.g., Strickland v. Washington,* 466 U.S. 668, 686-87 (1984); *United States v. Ortiz,* 146 F.3d 25, 27 (1st Cir. 1998). Nevertheless, petitioner bears a "very heavy burden" in his attempt to have his sentence vacated premised on an ineffective assistance of counsel claim. *See Argencourt v. United States,* 78 F.3d 14, 16 (1st Cir. 1996); *Lema v. United States,* 987 F.2d 48, 51 (1st Cir. 1993). The United States Supreme Court has developed a two-pronged test to determine whether a criminal defendant was denied his constitutionally guaranteed effective assistance of counsel. *See Strickland v. Washington,* 466 U.S. at 687. Pursuant to the test established in *Strickland*, petitioner must first establish that his counsel in the criminal proceedings was deficient in that the quality of legal representation fell below an objective standard of reasonableness. *See id.* at 688. If petitioner succeeds in showing deficiencies in his legal representation, then he must conclusively establish that said deficiencies operated a real prejudice against him in the criminal proceedings. *See id.* at 694. To demonstrate

such prejudice, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Within a habeas corpus case the decision to order an evidentiary hearing is left up to the discretion of the court. A court may deny an evidentiary hearing when "(1) the motion is inadequate on its face, or (2) the movant's allegations, even if true, do not entitle him to relief, or (3) the movant's allegations 'need not be accepted as true because they state conclusions instead of facts, contradict the record, or are 'inherently incredible.''" *David v. United States,* 134 F.3d at 477 (quoting *United States v. McGill,* 11 F.3d 223, 225-26 (1st Cir. 1993)).

GROUND ONE: BRADY VIOLATION

It is bedrock law that

> suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady v. Maryland, 373 U.S. at 87; *United States v. Cunan,* 152 F.3d 29, 33 (1st Cir. 1998). The duty to disclose favorable evidence is not absolute.

> "We do not . . . automatically require a new trial whenever 'a combing of

the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .'" *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *United States v. Keogh,* 391 F.2d 138, 148 (2d Cir.1968)). Instead, "[a] finding of materiality of the evidence is required under *Brady.*" *Id.*

In *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court elaborated a test for determining when undisclosed evidence is material for purposes of a *Brady* inquiry. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (opinion of Blackmun, J.); *id.* at 685, 105 S.Ct. 3375 (White, J., concurring in part and concurring in judgment); see also *Kyles,* 514 U.S. at 433-435, 115 S.Ct. 1555 (endorsing *Bagley* test as the proper measure of materiality). This does not mean that a defendant must convince the court of the certainty of a different outcome. Instead, one proves a *Brady* violation "by showing that the favorable evidence

> could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at 435, 115 S.Ct. 1555.

United States v. Cunan, 152 F.3d at 34.

"[A] prosecutor's duty to disclose exculpatory evidence extends beyond his or her personal knowledge of such evidence." *McCambridge v. Hall,* 266 F.3d 12, 21 (1st Cir. 2001); *see Kyles v. Whitley,* 514 U.S. at 437.

Petitioner complains that the government did not disclose that Fernández Ríos was not charged in Criminal No. 96-0263 (HL), that is, the Ismael Vega León case. The government explains that the targets of that investigation were Soto Mercado and Ismael Vega León, who were both arrested. There was an unidentified "Fran" mentioned in that investigation by Ismael Vega León. Fran's identity was not actively sought and the government refrained from pressing Fran's identification in order to protect an informant's identity. In relation to petitioner's motion, that the government knew of the identity of Fran and gave him some informal immunity, is pure speculation. The most that petitioner proffers is his unsupported understanding. That understanding is too ethereal to weigh in a section 2255 motion crucible. Fernández Ríos was made available to defense counsel for interview. Attorney Vega Pabón was familiar with Ismael Vega León's case since he had represented him and at trial asked Fernández Ríos if he was the "Frank from

172," thus making the connection between the unknown Fran and Fernández Ríos. That the government believed that Ismael Vega León was actually Fernández Ríos at the time of arrest is pure conjecture, particularly since Ismael Vega León mentioned Frank to the government informant during the investigation. Thus the failure to indict Fernández Ríos was not a benefit since the prior case went undeveloped in relation to Frank, or Fran, or Fernández Ríos. Attorney Vega Pabón did not know who Frank was, even knowing Ismael Vega León as well as he did. Only at the pretrial interview of Fernández Ríos was he able to make the connection with "Frank El Viejo".

Fernández Ríos also arguably had a state conviction since he was in state custody during trial. However, Fernández Ríos had been convicted and sentenced in Criminal No. 97-0173 (SEC) and was serving his federal sentence in Atlanta, not in Puerto Rico, in a state prison, as the result of state charges. It appears that petitioner assumed that the writ of habeas corpus applied to state custody but such a writ is needed to produce federal prisoners serving sentences outside of Puerto Rico.

Petitioner attacks the inadequacy of the examination of William del Valle Caraballo at trial. However, the trial record belies the allegations in the petition. Del Valle spoke of his criminal record and testified about the petitioner's carrying the gasoline can at the Cayey scene where the victims were placed following their torture. Trial counsel were provided

with several documents related to del Valle, such as his grand jury transcript, his testimony at state proceedings, National Crime Information Center (NCIC) print-out, reflecting an extensive criminal record, a record which was elicited on cross-examination at trial. Del Valle Caraballo's perception was also covered extensively on cross-examination at trial. This witness was particularly damaging and difficult to cross examine, and there is no doubt that the method used to cross-examine del Valle Caraballo was the result of tactics and not inertia. Furthermore, contrary to petitioner's argument, del Valle Caraballo's testimony was not uncorroborated. César Escobar testified at trial that he was told by Prieto Capote that the Cayey victims were thrown into the back seat of a car, forced to drink gasoline, and then executed and set on fire. *United States v. Rivera Newton,* 326 F.3d at 266. This does not mean that petitioner's Sixth Amendment rights were violated.

GROUND TWO: CONFLICT OF INTEREST

The Sixth Amendment ensures "reasonably effective assistance." *Strickland v. Washington,* 466 U.S. at 668-69. There is no clear way of determining what constitutes effective assistance of counsel because each individual case contains a "variety of circumstances" which create a "range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 689. There is a clear way of determining defective counsel which occurs when, "counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. However, even when counsel is defective, their errors will not mandate "setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. To set aside a judgment it must be demonstrated that counsel was defective and that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, *quoted in Phoenix v. Matesanz,* 233 F.3d 77, 81 (1st Cir. 2000).

While the government's "duty is as much 'to refrain from improper methods calculated to produce a conviction as it is to use every legitimate means to bring about a just one[.]' " *United States v. Giry,* 818 F.2d 120, 133 (1st Cir. 1987) (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)); *see also United States v. Meserve,* 271 F.3d 314, 333 (1st Cir. 2001); *United States v. Knott,* 256 F.3d 20, 29 (1st Cir. 2001); *United States v. Bartehlo,* 129 F.3d 663, 670-71 (1st Cir. 1997), it is also true that it benefits the administration of justice to have a defendant represented by a conflict-free attorney.

Three days before trial, the government alerted the district court to information obtained from Fernández Ríos regarding arrangements by Negri's drug organization to finance the legal defense of Rivera Newton and other associated criminal defendants. *See United States v. Rivera Newton,* 326 F.3d at 262. The Sixth Amendment insures the right of the defendant "to a speedy and public trial . . . and to

have the Assistance of Counsel for his defence. . . ." The Fifth Amendment states that "no person shall . . . be deprived of . . . liberty . . . without due process of law. . . ." "The Sixth Amendment right to counsel includes the right to have an attorney of one's own choosing; however, this right is not absolute." *United States v. Lanoue,* 137 F.3d 656, 663 (1st Cir. 1998). The purpose of the Sixth Amendment is to ensure "an effective advocate for each criminal defendant" not the right of the defendant to "be represented by the lawyer whom he prefers." *Wheat v. United States,* 486 U.S. 153, 159 (1988), *quoted in United States v. Matta-Timmins,* 81 F. Supp. 2d 193, 195 (D. Mass. 2000). "[T]he right to one's counsel of choice [is] limited 'when insistence upon it would disproportionately disadvantage the government or interfere with the ethical and orderly administration of justice.'" *Panzardi-Álvarez v. United States,* 879 F.2d 975, 980 (1st Cir. 1989) (quoting *United States v. Panzardi Álvarez,* 816 F.2d 813, 816 (1st Cir. 1987)).

Before the court was the allegation by Negri that drug money was delivered to an unindicted co-conspirator, Fernández Ríos, who delivered the money to someone, Johnny Adams, for delivery money to an office near Caguas, to be delivered to an attorney for Ismael Vega León. It is clear from the extensive dialogue which occurred between petitioner and the court after the disclosure of Fernández Ríos, that petitioner might have been required to contract the services of other attorneys if such information proved correct. However, after a more than adequate inquiry

into the source of the attorney's fees, and attorney Vega Pabón's knowledge of the source of his fees did the court allow petitioner the option to proceed or to change attorneys. Had the apparent conflict been sufficiently grave, the court might have required a substitution of attorneys, against petitioner's wishes. However, this did not happen since petitioner was fully informed and decided after sufficient time to consider his options, that he would continue with his attorneys, one of which had represented him for a number of years and in whom he obviously had great trust.

A representing attorney may be removed from the case against the wishes of the defendant where there is a potential conflict of interest. *Wheat v. United States,* 486 U.S. at 164. However, "a district court must inquire when advised of a potential conflict of interest, [and] the court may rely on counsel's representations that no such conflict exists. *United States v. Kliti,* 156 F.3d 150, 153 (2nd Cir. 1998). [Yet] [i]t is within the district court's discretion to override a defendant's waiver of protection from a conflict of interest." *United States v. Santiago-Lugo,* 167 F.3d 81, 84 (1st Cir. 1999).

The court of appeals, with the same advantage as this court now has of reviewing the record as to this allegation, decided that there was no basis for overturning the conviction based upon Sixth Amendment grounds absent an allegation that the performance suffered as a result of the alleged conflict. *United States v. Rivera Newton,* 326 F.3d at 263-64. The

United States notes that in this motion, petitioner raises additional arguments of ineffective assistance which do not conform to the facts of the case, are speculative, and constitute a repetition of the same issue of deficient cross-examination of Fernández Ríos. The government emphasizes that petitioner has not shown an actual conflict. I agree. In *Cuyler v. Sullivan,* it was held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980) (footnote omitted). The possibility is not enough, "a defendant [must show that his counsel actively represented conflicting interests." *Id.* at 350. Petitioner was alerted to the potential conflict. Even after reviewing and considering the extensive proffer in the memorandum of law, the conflict remains potential and not actual. The Sixth Amendment right to counsel is violated only when an actual conflict of interest adversely affects legal representation. *Bucuvalas v. United States,* 98 F.3d 652, 656 (1st Cir. 1996). Much of the argument in the petitioner's memorandum calls for speculation and possibilities. However, "theoretical or merely speculative conflict of interest" does not constitute a Sixth Amendment violation. *United States v. Soldevila-López,* 17 F.3d 480, 487 (1st Cir. 1994) (quoting *Mathis v. Hood,* 937 F.2d 790, 795 (2d Cir. 1991) (citing *United States v. Aeillo,* 900 F.2d 528, 530-31 (2d Cir.1990)).

At trial, counsel extensively cross-examined Fernández Ríos about drug deliveries to Miguel Rivera Newton and for example, focused several themes on petitioner's brother Miguel. Questions were asked in relation to del Valle related to the presence of Miguel Rivera Newton during the torture of the victims. Attorney Vega Pabón emphatically denied under oath his having received drug money as alleged by Fernández Ríos. Just as important is that notwithstanding the latest proffer, there is no clear evidence of actual conflict of interest. In order to show actual conflict, a defendant must show that "(1) the lawyer could have pursued a plausible alternative defense strategy or tactic and (2) the alternative strategy or tactic was inherently in conflict with or not undertaken due to the attorney's other interests or loyalties." *United States v. Soldevila-López,* 17 F.3d at 486 (citing *Guaraldi v. Cunningham,* 829 F.2d 15, 17 (1st Cir. 1987)). This was a difficult case to defend particularly with the number of witnesses who were co-conspirators testifying against petitioner. Suggestions made by petitioner on collateral review do not reflect a post-trial panacea for supposed performance inadequacies. Any actual conflict was not reflected in the performance of trial counsel.

THIRD GROUND:
DOUBLE JEOPARDY/DUE PROCESS

Petitioner argues that the state murder prosecution was a sham and that trial counsel should have moved to dismiss the federal prosecution based upon

the Double Jeopardy Clause. The United States tersely replies to this argument by arguing that the Cayey massacre was not retried in the federal court, and that the trials were held by two separate sovereigns. Petitioner was acquitted of murder in the state court. In the federal court, he was clearly not charged with murder, but rather with a violation of 21 U.S.C. § 846, a narcotics conspiracy statute. The Cayey massacre was an overt act in the conspiracy. No matter how similar, however, the local and state charges may be, double jeopardy does not attach. *See Bartkus v. Illinois,* 359 U.S. at 136; *United States v. Guzmán,* 85 F.3d 823, 826 (1st Cir. 1996). There is a narrow exception to this rule and petitioner attempts to invoke the exception successfully. That is when "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *United States v. Guzmán,* 85 F.3d at 827. The *Bartkus* exception is triggered when the state proceeding is a tool of the federal government, and a cover of the federal prosecution. *Bartkus v. Illinois,* 359 U.S. at 123-24. State and federal authorities routinely cooperate with each other. Petitioner must establish more than this parallel in even a strong cooperation. He must show that the two prosecutions were for the same offense. *Guzman* at 827. Once proffered, the government must show that the offenses are not identical. I need not smooth the ice. While petitioner may argue that there is an identity between the local and federal cases, that is not the case. They are not the same. They are different. And their prosecutions

stem from two sources of power. *United States v. López Andino,* 831 F.2d 1164, 1167 (1st Cir. 1987) (citing *Heath v. Alabama,* 474 U.S. 82, 88 (1985)).

Puerto Rico is a separate sovereign for purposes of double jeopardy. *See United States v. López Andino,* 831 F.2d at 1167-68; *United States v. Vega Figueroa,* 984 F. Supp. 71, 78-79 (D.P.R. 1997). The double jeopardy argument lacks merit.

FOURTH GROUND: SENTENCING ERROR

Petitioner claims that the imposition of a life sentence cannot be upheld because it was based on a judge-made finding regarding petitioner's involvement in a drug-related murder, depended on the suspect testimonies of Fernández Ríos and del Valle Caraballo, and was otherwise based on error, particularly under *Apprendi,* and holding him responsible for the total amount of the drugs handled in the conspiracy. Key in petitioner's contentions is that it is illegal to impose a mandatory sentence of life based on facts not submitted to the jury and found by them beyond a reasonable doubt and found instead by the sentencing judge using a preponderance of the evidence standard. The government responds that the court correctly applied the murder cross-reference set forth in guideline 2D1.1(d)(1), since victims were murdered in furtherance of the conspiracy. Said guideline increased the base offense level to 43, which carries with it a mandatory penalty of life imprisonment. The court of appeals noted that the 43 was

reached from 38 by adding five points for leadership and the possession of a weapon. *See United States v. Rivera-Newton,* 326 F.3d at 264-65.

In trial situations an attorney is given wide latitude in deciding how best to represent the defendant's interest. *Strickland v. Washington,* 466 U.S. at 688-89. To properly analyze this claim it is necessary to consider the sentencing guidelines of 21 U.S.C. §§ 841, *846, and 851, and rules emanating from the Apprendi* case. The guidelines of 21 U.S.C. §§ 841 and 846 state that any person who distributes or conspires with others to distribute one kilogram or more of heroin or five kilograms or more of cocaine may be sentenced to no less than ten years in prison and no more than life. Pursuant to 21 U.S.C. § 851, the severity of a sentence may be augmented by the presence of prior convictions. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 476 (200) (footnote omitted) (quoting *Jones v. United States,* 526 U.S. 227, 243 (1999)). These rules do not mean that judges may not exercise discretion "in imposing sentence within statutory limits in the individual case." *Apprendi v. New Jersey,* 530 U.S. at 481.

Petitioner's claim implicates an *Apprendi* issue. At sentencing the amount of drugs possessed by petitioner was clearly addressed. Petitioner's sentence was lengthened by a fact which was not "charged in

an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. at 476 (footnote omitted) (quoting *Jones v. United States,* 526 U.S. at 243).

Section 2D1.1(d) states that: "If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder)." U.S.S.G. § 2D1.1(d). Section 2A1.1 in turn directs the court to assign a base offense level of 43. *Id.* § 2A1.1. *See United States v. Rivera-Newton,* 326 F.3d at 265. The court determined that although petitioner did not participate directly in the actual killing of the Cayey massacre victims, petitioner was a part of the planning, was present and participated in the torture after the three victims had been kidnaped. *Id.* Although the petitioner claims that such determinations were made in error because the issue should have been submitted to and decided by the jury in accordance with *Blakely v. Washington,* 542 U.S. 296 (2004) and *Apprendi,* in view of the court of appeals having considered the issue and decided against petitioner, the petitioner is mistaken. However *Blakely* is not retroactive. *Blakely* was decided more than a year after the court of appeals issued its decision affirming his conviction.

Petitioner objected to the presentence investigation report. Petitioner objected, arguing that he should not have been sentenced under the provisions of 2D1.1(d)(1), the murder enhancement, which alone

results in a base offense level of 43, and also argued that he should not have received a role enhancement pursuant to section 3B1.1(b).

The First Circuit has put this particular question to rest on several opportunities. First, it has been held that "*Apprendi* does not apply to findings made for purposes of the sentencing guidelines, such as the court's determinations that the [petitioner was] accountable for the murders." *United States v. Martínez-Medina,* 279 F.3d 105, 122 (1st Cir.2002). Second, such determination can be made by the court by a preponderance of the evidence. *See United States v. Newton,* 326 F.3d at 265 where the reviewing court declined petitioner's invitation to expand the rule in *Apprendi* to require juries to find beyond a reasonable doubt that defendant committed murder before the court can apply section 2D1.1(d)(1)'s cross-reference. In the same year, the First Circuit reiterated its position holding that for purposes of sentencing determinations, the sentencing court can consider relevant conduct not charged in the indictment so long as the conduct is proven by a preponderance of the evidence. *United States v. Reyes Echevarría,* 345 F.3d 1, 6-7 (1st Cir. 2003). The sentence did not exceed the statutory maximum. In other words, the life sentence imposed was the statutory maximum for the offense charged. And there is no hint that the district court would have imposed a more favorable sentence under the new advisory guidelines were they to apply, particularly if one considers the

alternate findings made by the trial court. *United States v. Rivera Newton,* 326 F.3d at 266.

Since, the drug amount was not the reason why the defendant's sentence was lengthened, *Aprrendi* is not applicable. The judge was within his realm of discretion to issue a life sentence because 21 U.S.C. §§ 841 and 846 allow for life sentences. Therefore, there is no *Apprendi* violation because this sentence was within the statutory limit of the individual case. *Apprendi v. Washington,* 530 U.S. at 481.

Additionally, it was unnecessary for the sentencing court to examine the amount of drugs attributable to petitioner. As Negri's right hand, and with a key role in the enterprise, it could easily be inferred that petitioner could be held responsible for a large amount of narcotics. Accordingly, the defendant was not prejudiced by his counsel's failure to bring these issues before the trial court.

FIFTH GROUND: PROSECUTION RELYING ON FALSE TESTIMONY

Petitioner accuses the government of knowingly allowing false testimony during trial. However, this argument is generally conclusory and based upon speculation. For example, petitioner argues that Rosado Jiménez escaped liability by testifying but he did not testify against petitioner at trial, although he was charged in the criminal case and sentenced to 360 months. Rosado Jiménez was subject of a U.S.S.G. § 5K1.1 downward departure agreement in

Criminal No. 96-0091 (DRD) but it was withdrawn by the government when it was determined that he had lied. He was then charged in Criminal No. 98-0072 (PG). Statements of people who were not government witnesses were relied on by petitioner in the 2255 motion: Nilda Díaz Rodríguez, Luis Collazo Jiménez, Ángel Ruiz Adorno and Alex Joel Franco Cedeño in order to attack the performance of trial counsel and in attacking the government in its alleged use of false testimony. Based on this investigation, petitioner thinks that government witnesses must have agreed to testify on equal terms among themselves. Again this is conclusory. Petitioner argues that trial counsel did not object to hearsay and other inadmissible evidence. However, the trial court made a correct *Petrozziello* ruling, *United States v. Petrozziello,* 548 F.2d 20 (1st Cir. 1977) in allowing statements of Wes Solano to Pérez Alicea describing the Isla Verde murders, and statements made by Prieto Capota, Negri's triggerman, to César Escobar concerning the Cayey massacre and Isla Verde murders. *See United States v. Rivera Newton,* 326 F.3d at 257. The evidence clearly confirms that Solano and Rivera Newton were co-conspirators in the broader drug trafficking conspiracy. *Id.* at 259.

CONCLUSION

Six of petitioner's co-defendants agreed to testify against him at trial in exchange for reduced sentences. He thus faced a difficult onslaught of evidence through no fault of his attorneys. Trial counsel

received the required disclosure regarding the then government's witnesses under *Brady* and *Giglio*. In the unlikely and unsupported event that the government might have omitted a conviction or an arrest of one of the three witnesses mentioned by petitioner, the prejudice would have been negligible considering the nature of not only the offenses charged but of the cast of characters involved. Motive and bias was clear. None of the cooperating co-conspirators that testified wanted a life sentence. Petitioner's subsequent prosecution in a narcotics conspiracy case containing overt acts of murder did not trigger the protection from successive prosecutions of the Double Jeopardy Clause. Petitioner did not make a sufficient showing that attorneys Vega Pabón and Andreu Fuentes labored under an actual conflict of interest which affected their trial performance and thus violated their Sixth Amendment right to adequate representation of counsel. There is no evidence of portent which leads to the conclusion that the government promoted or condoned false trial testimony.

Petitioner has failed to establish that his attorneys in the criminal proceedings were deficient in that the quality of their legal representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. at 686-87; *United States v. Downs-Moses*, 329 F.3d 253, 265 (1st Cir. 2003). But even assuming that petitioner were to have succeeded in showing deficiencies in their legal representation, then he must conclusively establish that said deficiencies operated a real prejudice

against him in the criminal proceedings. To demonstrate such prejudice, petitioner must have shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The *Strickland* standard was clearly not transgressed by counsel's performance. Finally, collateral review of issues or claims which were already presented to and addressed by the court of appeals is barred, since a section 2255 motion is "neither a recapitulation of nor a substitute for a direct appeal." *McCleese v. United States*, 75 F.3d 1174, 1177 (7th Cir. 1996) (quoting *Bedford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992)). Much of petitioner's argument was addressed or could have been addressed on direct appeal.

Accordingly, it is my recommendation that the section 2255 motion be dismissed in its entirety without an evidentiary hearing.

Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Davet v. Maccorone*, 973 F.2d 22, 30-31 (1st Cir. 1992); *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st

Cir. 1988); *Borden v. Sec'y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-79 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980).

At San Juan, Puerto Rico, this 7th day of March, 2006.

/s/ JUSTO ARENAS
Chief United States
Magistrate Judge